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OCTOBER TERM, 1974

No. 74-878

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Appellants,

v.

HON. PETER J. BRENNAN,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Continued)

JURISDICTIONAL STATEMENT

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IN THE

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No.

NATIONAL LEAGUE OF CITIES, *et al.*,

Appellants,

v.

HON. PETER J. BRENNAN,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

Appellants appeal from the final order of the United States District Court for the District of Columbia, entered on December 31, 1974, dismissing the Complaint and denying Plaintiffs' (Appellants') Application for a Preliminary Injunction. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial constitutional questions are presented.

OPINION BELOW

The Order, Findings, and Opinion of the United States District Court for the District of Columbia, Civil Action 74-1812 (Dec. 31, 1974) (per curiam) is unreported but is attached as Appendix A hereto.

JURISDICTION

This Suit was brought under 28 U.S.C. §§ 1331 and 1337 for injunctive and declaratory relief that all the 1974 Amendments to the Fair Labor Standards Act, Pub. L. 93-259, 88 Stat. 55, amending 29 U.S.C. § 201 *et seq.* (1970), made applicable to States and Cities, violate the Fifth, Tenth, and Eleventh Amendments to the Constitution, and cannot be based on Art. I, § 8, cl. 3 of the Constitution. This action was filed in the District Court on December 12, 1974. The District Court, having been constituted a Court of Three Judges, dismissed the Complaint and denied Plaintiffs' Application for a Preliminary Injunction on December 31, 1974. In its Order, the District Court stated it was acting under both Rule 12 and Rule 56, Federal Rules Civil Procedure. (App. at 10a). On December 31, 1974, Plaintiffs noted their appeal in the District Court and applied to this Court for a stay and an injunction *pendente lite* which was granted by the Chief Justice of the United States on December 31, 1974, and continued by this Court on January 13, 1975 on condition that this Jurisdictional Statement be filed by January 17, 1975. The jurisdiction of this Court to

review the District Court's Order by direct appeal is conferred by 28 U.S.C. § 1253.

QUESTIONS PRESENTED

1. Whether *Maryland v. Wirtz*, 392 U.S. 183, holding the Fair Labor Standards Act's enterprise concept to be constitutional under the Commerce Clause as applied to employees of those state-owned hospitals and schools which are in competition with private hospitals and schools is controlling precedent for extension of that Act to all those State and City employees who are not engaged in such competition.

2. Whether all State and City Government is engaged in commerce among the States thus conferring constitutional power under the Commerce Clause upon the Federal Government to regulate wages, hours, and other terms and conditions of employment for all non-supervisory State and local Government employees.

3. Whether all State and City Government affects commerce among the States to an extent which confers constitutional power under the Commerce Clause upon the Federal Government to regulate wages, hours, and other terms and conditions of employment for all State and City employees.

4. Whether a Federal Act which usurps control of State and City essential Government services by increasing the cost of providing some services so greatly that these and other essential Government services must be altered or curtailed, and by conflicting with fair and valid State and City laws governing public employment and public debt, can have a rational basis under the

Commerce Clause, where States and Cities neither are in commerce nor provide essential Government services interstate.

5. Whether the careful balance struck between the Federal and the State Governments in the Constitution requires a more direct impact on commerce before the Commerce Clause can be used to rationalize an abrogation of the Tenth Amendment in the form of a Federal preemption of control over the hours, wages and other terms and conditions of employment of non-supervisory state and local government employees for the first time in 200 years, than the impact on commerce necessary to regulate private industrial functions.

6. Whether the Eleventh Amendment is violated by a Federal Statute authorizing employee suits against States and Cities in Federal Courts, including class actions, liquidated damages, counsel fees, and costs.

STATUTES INVOLVED

Public Law 93-259, 88 Stat. 55, is set forth in Appendix B hereto. This case involves the constitutionality of the provisions of that Public Law as applied to States and Cities under Article I, Section 8, Clause 3 of the Constitution of the United States and the Fifth, Tenth, and Eleventh Amendments to the Constitution.

STATEMENT

The Appellant States and Cities ask this Court to review and reverse a Three-Judge District Court decision

(Appendix A) holding that the Federal Government may take over regulation of wages, hours, compensable time, and other personnel matters for nearly all 11,000,000[1] non-supervisory State and local Government employees by amending the Fair Labor Standards Act (Act) to so provide. Public Law 93-259, 88 Stat. 55 (Appendix B), amending 29 U.S.C. § 201 *et seq.* The Federal Government thus has usurped an essential State and local governmental function in violation of the Fifth, Tenth, and Eleventh Amendments.

The District Court held that *Maryland v. Wirtz*, 392 U.S. 183, was controlling, although it was clear during the course of oral argument[2] and is stated in its opinion on Plaintiffs' Application for a Preliminary Injunction that all three judges felt uncomfortable with the total derogation of Federalism inplicit in the reading they felt constrained to find that *Wirtz* gave to the Commerce Clause of the Constitution. (App. at 9a). Appellants' core contention is that State and City employees are engaged in sovereign governmental functions of the States, and that they are not engaged in commerce. (Complaint ¶'s 7-11, 40).

The majority of increased costs resulting from the Amendments do not flow from the Act's basic mandates regarding minimum wages and maximum

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[1] *Public Employment in 1973,* U.S. Dept. Commerce, Social and Economic Statistics Admin., Bureau of Census, at 1, reporting "11.4 million" state and local government employees in October 1973.

[2] The transcript of the oral argument on the Application for Preliminary Injunction and on Defendant's (Appellee's) Motion to Dismiss the Complaint has not yet been typed. When typed, this transcript will be certified to this Court with the remainder of the Record in this case, including the evidence supporting the Complaint and the District Court's Findings.

hours. The greater portion of the budget-breaking fiscal impact projected for this federally dictated policy stems from the generalized regulatory provisions under the Act and the Act's history of application to private enterprise. When these policies collide with the diversity of State and local Government practices, the result is to force additional costs upon the Governments. This result is illustrated by examples given in the Complaint in the areas of compensatory time off (Complaint ¶¶49, 66), flexible scheduling practices (Complaint ¶49), employment of student interns (Complaint ¶¶49, 60), police and fire training (Complaint ¶¶56, 69-70), availability of "reserve" policemen (Complaint ¶57), and paid volunteers (Complaint ¶28), institution of affirmative action programs (Complaint ¶59), computation of payrolls (Complaint ¶63), membership on volunteer boards and commissioners (Complaint ¶65), and joint employment (Complaint ¶¶29, 46).

The fundamental constitutional issues raised by this Appeal will not turn on the millions of taxpayers' dollars in unnecessary costs which the Act admittedly imposes upon States and Cities. However, a few illustrations of cost estimates serve to highlight the magnitude of the impact of this unconstitutional Act on the States and Cities.

Appellee admits in the preamble to his Regulations of December 20, 1974 on tours of duty, wages, hours, compensable time in the counting of sleep and meal time, and other employment practices of fire and police for *overtime only* will cost States and Cities $27,500,000 in 1975. 29 C.F.R. § 553 reprinted as Appendix C hereto.

Plaintiffs, using 25 of 15,000 Cities and 10 of the 50 States as illustrations, presented to the Court below

specific fact estimates on increases caused by the Act in the verified Complaint, depositions and exhibits, totalling $57,000,000, with a $200,000,000 estimate of first year increased costs for all firemen, and an expert informed estimate of over one billion dollars in 1975 in increased costs for all State and local Government employees. (Complaint ¶¶44-72, Byrley Deposition at 20-21). The vast new Federal records, and reports and decisions required by the Act of States and Cities and the restructuring of State and local employment practices from State and City to Federal control, are enormously costly. Governor Askew of Florida estimates an annual $800,000 for new "Federally mandated record keeping costs under the Act" for his State. (Defendant's Ex. 43 to Byrley Deposition and Complaint ¶37).

Appellee offers no estimate of the total cost which application of the Act and Regulations will impose as to other State and City employees. The Senate Committee Report on the Act estimated a first year cost of $128,000,000 and a second year cost of $162,000,000. (S. Rep. No. 300, 93d Cong., 1st Sess. 26 (1973)). The House Report estimated a first year cost of $250,000 for the Federal Government with only $3,000,000 per year as the cost for the next 5 years. (H.R. Rep. No. 913, 93d Cong., 2d Sess. 41 (1974)).

Ultimate questions and decisions as to State and local employment practices are now moved from City Hall and State capitals to Appellee in Washington. Since personnel costs are 80 to 85% of City operating budgets, the Act effectively vests ultimate budget decisions and controls in Appellee. (Complaint ¶36, Pritchard Deposition at 126-127). These arbitrary and capricious requirements as interpreted by Appellee's Regulation of December 20 raise statutory and due process issues in terms of reasonable and timely notice

of what it is that is required of States and Cities. (Complaint ¶39 as amended). The Appellee has refused to issue new or clarifying Regulations for States and Cities, except for firemen and policemen. He has made applicable to States and Cities parts of the same 800 pages of Regulations previously issued for private industry, 29 Code of Federal Regulations Parts 500 to 1899. But Appellee has admitted that only 15% of said Regulations apply to States and Cities. (Pritchard Deposition at 121-123).

The Act was made applicable to States and Cities under false representations in congressional reports that it would have no significant impact upon States and Cities since the pay they provide exceeds the minimum wages required by the Act. The House Report on the Act quotes a Department of Labor report of 1970 that:

> "... wage levels for State and local government employees not covered by FLSA are, on the average, substantially higher than workers already covered." H.R. Rep. No. 913, 93d Cong., 2d Sess. 28 (1974).

Arguing from this statement, the Report continues:

> "The actual impact of a 40 hour standard would have been less because a substantial proportion of the employees receive premium overtime pay." *Id.* at 29.

The Committee Report concludes:

> "The actual impact on State and local governments then, of a 40 hour standard, will be virtually nonexistent." *Id.* at 29.

There is no evidence in the legislative history that a "poverty level" or "substandard" wage problem involving commerce exists in State or City Government.

There is likewise no evidence that the Government functions of States and Cities are commerce or adversely affect commerce and the verified Complaint states they do not. (Complaint ¶¶7-11).

The magnitude and public importance of the issue here presented requires a final and definitive decision by this Court. The sheer breadth of the seizure of control over nearly all State and City employees by the Act is staggering. It is conceded that some specific activities of States and Cities could be in commerce, such as the railroad and similar commercial operations which have been before this Court in *United States v. California*, 297 U.S. 175, and similar cases. It is impossible, however, to envision that all the vast public service functions of such governments are in commerce. This Federal broadside claim of all power over a function as intimate and important as all State and City employment practices, makes the aim of the Act so broad as to provide no rational basis for this legislation and thus to fall under the Fifth Amendment's ban as well as the Tenth and Eleventh Amendment's prohibitions. (Complaint ¶40).

States and Cities are in dire financial straits. The record supports the conclusion that applicability of this Act to them at this time of inflation and depression could well spell bankruptcy for many of them.[3] With Cities and States already laying off thousands of

[3] See Appellee Brennan's testimony opposing the Act's applicability to States and Cities. *Hearings on H.R. 4757 & H.R. 2831 Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 93 Cong., 1st Sess. 263 (1973), where he says, "Imposition of the Federal standard for coverage, particularly for overtime, could have a disruptive impact on many State civil service systems and the additional costs could overburden many small governmental units."

employees, the applicability of this Act exacerbates an already dire situation which is cresting to an ever greater national crisis. (Pritchard Deposition at 163-164).

In *Maryland v. Wirtz*, 392 U.S. 183, 196, the majority opinion said "The Court has ample power to prevent what the Appellants purport to fear–'the utter destruction of the State as a sovereign political entity.'" The Court rejected in a footnote on the same page the suggestion of Mr. Justice Douglas and Mr. Justice Stewart in their dissent that the Congress under that decision could overwhelm the States fiscally and take over their budgets by declaring an entire State an "enterprise". 392 U.S. at 204-05.

Yet, that is exactly what has happened by the Statute here challenged.

It is urged that this Court never intended its decision in *Wirtz* to allow the take-over of 80 to 85% of State and City budgets, as has been done here. (Pritchard Deposition at 126-127, Complaint ¶36). The District Court was in error in so interpreting and applying that decision. See also, *Employees v. Department of Public Health and Welfare of Missouri*, 411 U.S. 279.

The case of *Fry v. Ferguson*, 34 Ohio St. 2d 252, 298 N.E. 2d 179 (1973), is pending (*Fry v. United States*, No. 73-822, argued November 11, 1974) and *Coan v. California*, 11 Cal. 3d 286, 520 P.2d 1003, 113 Cal. Rptr. 187 (1974) has been docketed (*California v. United States*, No. 74-739). *Iowa v. Brennan* (No. 73-1565), involving the 1966 amendments to the Act, is also receiving consideration by this Court. We therefore respectfully urge that the District Court misread *Wirtz*. Clearly that Court had misgivings as to its interpretation

as it found the constitutional questions raised here to be "substantial" and urged this Court to reconsider the meaning of some of the broad language of *Wirtz*. (App. at 6a-9a). Under these circumstances, this Court should grant review and clarify and settle the grave constitutional power questions which are involved.

It is difficult, if not impossible, to achieve a historical perspective in the heat of a controversy of this nature. Indeed, the wisdom of our forefathers gives this Court the duty of taking the longer look and to review for their constitutionality the actions of the Executive and the Legislative Branch. Especially is this true when there is a shifting to Federal officials by Federal legislation of a function performed for so long by States and Cities.

It does not require a hyperactive imagination to conclude that this is a benchmark controversy in the consideration of what the Constitution strikes as a proper balance of power and function between the Federal and State Governments. If *Wirtz* is to be given the broad sweep the District Court held compelled to read into it, then the Commerce Power has no realistic parameters, and constitutional Federalism is on the wane, if not in *rigor mortis*.

THE QUESTIONS ARE SUBSTANTIAL AND WERE EXPRESSLY SO FOUND BY THE DISTRICT COURT

1. This Court's Decision in *Maryland v. Wirtz* Cannot Provide a Rational Basis for Federal Usurpation of State and City Government Functions.

a. *Wirtz* must be limited to its facts, which are greatly different from this Case involving essential Government functions and vast power over the major element in all State and City budgets.

In 1968, this Court considered the constitutionality of the 1966 Amendments extending the Fair Labor Standards Act via the interstate "enterprise" concept and specifically, extending the Act to all schools and hospitals, including those which are State-owned. The Congress' rationale for this extended coverage is stated in the 1966 Committee Reports:

> "These enterprises [public schools and hospitals] which are not proprietary, that is, not operated for profit, are engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose." S. Rep. No. 1487, 89th Cong., 2d Sess., 1966 U.S. Cong. and Adm. News 3010 (1966); H. R. Rep. No. 1366, 89th Cong., 2d Sess. 16 (1966).

These amendments were upheld as applied to State hospital and school employees by a divided Court in *Maryland v. Wirtz*, 392 U.S. 183.

Appellee, and the Court below, although the latter said it was "troubled" by doing so and nonetheless finding the Complaint raises "substantial" constitutional questions both stretch what this Court was careful to

describe as a very limited decision into an unlimited decision. This is error. A review of language which the District Court thought this Court might now "draw back from" demonstrates this error in expanding a narrowly conceived decision based on a new industrial "enterprise" concept and "competition" into State and City governmental function areas where the concept does not fit and actual competition cannot reasonably be found.

The finding in *Wirtz* of a rational basis under the "labor strife" theory, 392 U.S. at 192, and the "use of goods imported interstate" theory, 392 U.S. at 195, does not dispose of this Case, especially against the tremendous broad fiscal impact and coverage of the 1974 Amendments, which are made applicable to nearly all State and local Government employees, and the usurpation of sovereign powers guaranteed against irrational Federal usurpation by the Tenth Amendment. (Complaint ¶40).

This Court refused to decide in *Wirtz* "whether the schools and hospitals have employees engaged in commerce or production," 392 U.S. at 201, reserving this question. This question is now before this Court in *Iowa v. Brennan*, No. 73-1565, *petition for cert. filed*, 43 U.S.L.W. 3637.

The holding in *Wirtz* was limited by this statement:

> "Congress has 'interfered with' these state functions only to the extent of providing that when a State employs people in performing such functions [operating State schools and hospitals] it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operating schools and hospitals." 392 U.S. at 193-194.

Implicit in this statement is a finding by the Court that State schools and hospitals are to some extent in competition in commerce with private schools and hospitals. Not only is this finding of competition in commerce wrongly credited as a rational basis for application of the Act to States and Cities–not only was *Wirtz* wrongly decided on its facts–but the facts of this case make *Wirtz* inapposite. It was this distinction between *Wirtz* and the instant case which the Court below, in dismissing the Complaint, failed to recognize. State and City police and fire service, for example, compete with no one–not with private police and fire services, and not with the essential Government services of other States and Cities. No one competes with State and City regulation of businesses, licensing and tax collection. Federal interference with these essential Government functions was not considered, and certainly was not approved or condoned, in *Wirtz*.

Wirtz did not consider an impact on States and Cities of near the magnitude of the damage which the 1974 Amendments to the Act cause. This Court was not swayed by the impact of applying the Act to school and hospital employees. According to the Bureau of the Census' report, *Public Employment in 1973*, footnote 1, *supra*, page 5, hospital employees constitute only 9.6% of full-time State and local Government employees. *Id.* at 3 Table C. Of these, the Act as reviewed in *Wirtz* exempted from coverage physicians, nurses, professionals and administrators. Pub. L. 89-601, 80 Stat. 833, amending 29 U.S.C. § 213(a)(1). Of the 49.6% of full-time State and local Government employees who are in education, *Public Employment in 1973* at 3 Table C, well over half are teachers, *Id.* at 9 Table 3, who were

exempted from coverage by the Act reviewed in *Wirtz*, Pub. L. 89-601, 80 Stat. 833, 29 U.S.C. § 213(a)(1).

Appellants present here the very situation which was the cause for alarm to the *Wirtz* dissent, 392 U.S. at 204-205, and which the majority there excluded by cautiously limiting its holding, 392 U.S. at 196 and footnote 27 on that page. By the 1974 Amendments to the Act Congress has created the concept of a "public agency" and attempted to give it all the attributes of an "enterprise" engaged in commerce. This unconstitutional extension of the commerce power has caused, by regulation, the entire reordering of budgetary priorities of State and local Governments. The result is the elimination or diminution of unique sovereign governmental functions, without which States and local Governments cannot adequately serve and protect the persons within their jurisdictions. (Complaint ¶ 39).

Personnel costs are 80 to 85% of City budgets. (Pritchard Deposition at 126-127). The 1974 Amendments to the Fair Labor Standards Act transfer control of City and State budgets–and with control of budgets, control of City and State Governments themselves– to Federal officials and employees who are neither elected from nor residents of the Cities and States they will control. (Complaint ¶ 36). No State or City election can vote the Administrator of the Department of Labor's Wage and Hour Division, to whom Appellee has delegated many of his duties under the Act, out of office because she or he raised their budget through his or her decisions in enforcing an irrational law. (Pritchard Deposition at 212-213).

It is ironic that the Bicentennial of this Nation's freedom from control by non-elected officials geo-

graphically remote from local needs, is the year during which Appellee herein will determine, pursuant to §6(c) of the 1974 Amendments (App. at 6b), what hours may be worked by employees of State and City Governments. *See*, Appendix C for his minute regulations of work performance by police and firefighters. This determination will dictate the overtime requirements of employees providing noncompetitive, intrastate, essential Government services. Thus will the 1974 Amendments produce "a mass of confusion which is going to completely disrupt 200 years of stylized operations, which has been a tradition at the local government level." (Pritchard Deposition at 123). State and City law (Complaint ¶¶19, 22-32) governing the provision of essential services will be replaced by Federal law and regulations, 85% of which are admittedly applicable only to private industry and not to States and Cities. (Pritchard Deposition at 122).

Moreover, the 1974 Amendments expose States and Cities to criminal penalties for willful violation, double back wages, individual and class actions and other civil penalty provisions, all in violation of the Fifth Amendment's requirement of substantive due process. The Act authorizes, not only enforcement by Appellee the Secretary of Labor, but also private and private class enforcement actions in State or Federal Courts, in violation of the Eleventh Amendment. *See, Edelman v. Jordan*, 415 U.S. 651. To permit these enforcement actions to flood the Federal Courts would overtax our already burdened system of justice. A glance at the some 150 State supreme court decisions rendered monthly involving Cities demonstrates the vast amount of litigation in State Courts involving employment

rights which must go into the Federal Courts under the Act. *See, Municipal Law Court Decisions* published monthly by the National Institute of Municipal Law Officers since 1942.

While this Court in *Employees v. Dept. of Public Health*, 411 U.S. 279, 286, indicated its reluctance to believe that Congress would alter §16 of the Act, 29 U.S.C. §216, to allow for liquidated damage suits against a State by its employees, the 1974 Amendments make it clear that this is the exact result Congress desires to impose.

Never before has there been such a vast elimination of successful State and local initiative and autonomy under the shared duties and powers of Federalism. The Constitution does not contemplate homogeneous State and City Governments, indistinguishable except as to name and geography, with uniform governmental services provided by rigidly (and federally) regulated public employees who all work for the same pay and under precisely the same conditions. Since *Wirtz* did not involve such a vast elimination, this first attempt should be cause for careful consideration of the disastrous results that such a power shift will cause. Never before has there been such a pervasive interference with the constitutional powers of States and Cities to establish their own Governments and methods of providing Government services, as preserved by the Tenth Amendment. *See, Collector v. Day*, 78 U.S. (11 Wall.) 113, 124; *Brush v. Commissioner*, 300 U.S. 352, 364; *Shapiro v. Thompson*, 394 U.S. 618, 633; *Texas v. White*, 74 U.S. (7 Wall.) 700, 725; *Wilson v. North Carolina ex rel. Caldwell*, 169 U.S. 586, 594; *Kotch v. River Port Pilot Commrs.*, 330 U.S. 552, 557; *Taylor v.*

Beckham, 178 U.S. 548, 570; *Newton v. Comm'rs*, 100 U.S. 548, 559. It is the office of this Court not to let this attempt be fulfilled without a finding of rational connection to a delegated constitutional grant of power to the Federal Government. No such rational connection exists.

b. The 1974 Amendments, in usurping State and City Government functions, must pass a test of rationality higher than that applied in *Wirtz*.

To follow *Maryland v. Wirtz*, 392 U.S. 183, in this case would be to ignore the principle—which the Court in *Wirtz* did not consider, likely because of its finding, at 392 U.S. 193, of no Federal interference with State and City functions—that a rational basis for Federal legislation is more reluctantly found where to do so would force the States and Cities to reduce or eliminate provision of essential Government services. State legislation is more carefully scrutinized under the Fourteenth Amendment when it interferes with a constitutionally protected right or status, such as those of race discrimination or freedom of expression. So also must Federal legislation be more carefully scrutinized under the Fifth Amendment standard of rationality when it interferes with rights and powers protected under the Tenth Amendment. Judge Leventhal raised this question during the argument below (Hearing on Application for Preliminary Injunction and on Motion to Dismiss, Dec. 30, 1974).

The decision in *Wirtz* cannot govern this challenge to the commerce power as a justification for coverage of

all State and City employees by the Act. Citation to *Wirtz* subsumes the question here of the rational basis under the Commerce power of the 1974 Amendments:

> "There remains, of course, the question whether any particular statute is an 'otherwise valid regulation of commerce.' *This Court has always recognized that the power to regulate commerce, though broad indeed, has limits.*" 392 U.S. at 196 (emphasis added).

The opinion of a divided Court in *Wirtz* did not address itself to the question of this case, whether a Federal act which irreparably harms States and Cities in conflict with valid, fair and reasonable State and City laws and policies for the operation of States and Cities can have a rational basis.

The opinion in *Wirtz* is neatly divided into consideration of two principal challenges to the 1966 amendments to the Fair Labor Standards Act. This Court, at 392 U.S. 188-193, considered the rationality of the "enterprise concept" as applied to all employees, including those of the private sector. There is no discussion of rationality of the "enterprise concept" as applied to the facts of the case, that is, as applied to States. The majority opinion, at 392 U.S. 195-199, then considered whether the Tenth Amendment to the Constitution could stand in the way of "the Federal Government, when acting within a delegated power", 392 U.S. at 195. The missing logical connective, of course, is whether the power is rationally delegated and the Federal Government can rationally act within a delegated power when it takes action usurping State power and dictates to States and Cities the extent of essential Government services. The opinion of the

divided Court in *Wirtz* treated this connective, the essence of the instant case, only cursorily. In doing so, the Court found facts and enunciated law which are not here controlling.

This Case involves power under the Constitution of the United States to regulate wages, hours and other personnel practices of some 11,000,000 State and City employees.[4] From the adoption of the Constitution until 1974 this power to regulate their own employees was considered to reside in the States and their political subdivisions except in a few instances where State employees were engaged in, or were overwhelmingly in competition with business in, interstate commerce.

On the question, essential here, of the possibility of a rational basis for Federal legislation which increases State and City Government costs, *Wirtz* is inconsistent within itself. While in the body of the opinion this divided Court said:

> "The Act establishes only a minimum wage and a maximum limit of hours unless overtime wages are paid, and does not otherwise affect the way in which school and hospital duties are performed. Thus appellants' characterization of the question in this case as whether Congress may, under the guise of the commerce power, tell the States how to

[4] *See* footnote 1, *supra*, page 5 and H.R. Rep. No. 913, 93d Cong., 2d Sess. (1974) 27 which gives a figure of 5 million to be covered by the 1974 Amendments with 3.5 million (not all State employees) covered by the 1966 amendments, then states: "The bill will provide that virtually all non-suprevisory government employees will be covered."

> perform medical and educational functions is not factually accurate."[5] 392 U.S. at 193,

the Court appended to the following sentence a footnote which contradicts this finding of no interference with State functions, so essential to the decision in *Wirtz*:

> "That this provision [special means of computing hospital overtime] may seem to some inadequate, and that no similar provision was made in the case of schools, are matters outside judicial cognizance. The Act's overtime provisions apply to a wide range of enterprises, with differing patterns of worktime; they were intended to change some of those patterns. It is not for the courts to decide that such changes as may be required are beneficial in the case of some industries and harmful in others." 392 U.S. at 194 n. 22

The question presented here of whether Congress, under the guise of the Commerce Clause, may rationally dictate to States and Cities which essential Government services may be provided within State debt and tax limitations, is also before this Court in the cases of *Fry v. United States*, No. 73-822, and *California v. United States*, No. 74-739. (Complaint ¶¶ 36, 73-78).

Nowhere in the hearings or congressional findings is there any indication that State and local Governments

[5] *But see* the Appellee's regulations of December 20, 1974, for police and firefighters, Appendix C, and note the detailed controls of sleep time and all the other employment practices there covered with the Administrator in §553.2 reserving to herself final decision power to "determine the compensable hours of work, tour of duty and work period in applying the section 7(k) exemption." This is no mere formality of action with little impact on police and firefighters.

in carrying out essential governmental activities such as police and fire protection compete with interstate industrial enterprises. As this Court stated in *Gomillion v. Lightfoot*, 364 U.S. 339:

> "Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts." 364 U.S. at 343-344.

By disregarding the variant controlling facts of the present situation, Congress has transgressed the constitutional boundaries of the Commerce Clause and has rendered the Act it has adopted without rational basis and therefore invalid.

Quite clearly, the police and fire protection given by State and local Governments, along with numerous other State and local sovereign functions such as tax collection, are not the type of activities engaged in by "private persons" at all. Absent therefore is the concept of "competition" heavily relied upon in *Wirtz*. (See App. at 7a for reference to this subject by District Court). A person does not choose between two competing fire departments for the one which can most cheaply extinguish his fire, or between two competing police departments for the one which can most economically bring a felon to justice. Unlike the schools and hospitals in *Wirtz*, there are no such things as private and public police departments, fire departments or court houses. Only Government can license, regulate and tax. There is only the State or local Government

within its well-defined jurisdictional boundaries, acting in its traditional sovereign capacity. Therefore, the result if the 1974 Amendments are upheld by this Court will be not to end wage stifling competition but rather to end many Government services through federally imposed costs which cause State constitutional and charter spending limitations to be reached. (Complaint ¶¶ 36, 73-78). This provision of the barest minimum of sovereign Government services at increased costs is the certain result of wiping out local governmental arrangements and imposing vast new overtime, record keeping, reporting, administrative and decision costs to meet Federal mandates. (Complaint ¶¶ 37, 73-78).

c. Federal officials, both Legislative and Executive, admit that the 1974 Amendments can pass neither this higher test nor the traditional rational basis test.

In *Maryland v. Wirtz* (No. 742, Oct. Term 1967), the United States in its Brief on the merits stated, at page 21 n. 11:

> "The nature of the commerce power is, like the war power, [citing cases] such that its exercise cannot be limited if the ends for which it was designed are to be accomplished."

In its decision this Court rejected that claim of plenary power. 392 U.S. at 196.

By the time of *Fry v. United States*, No. 73-822, this Term, the United States, in its Brief on the merits would say only, at 17:

> "This Court has repeatedly recognized the broad sweep of the power that Congress has over commerce."

And in oral argument before the Supreme Court, the United States admitted expressly that the commerce power is not plenary.

That in *Fry*, a case challenging the constitutionality of the Wage Stabilization Act of 1970 to States and their political subdivisions, the United States relied on *Wirtz* but retreated from the untenable assertion in its Brief in *Wirtz* that the commerce power was plenary and without limits, constitutes an admission by the United States, important to this case.

The legislative history of the original Fair Labor Standards Act indicates that one of Congress primary goals was the elimination of unfair competition in commerce due to wages below poverty levels and substandard working conditions. S. Rep. No. 884, 75th Cong., 1st Sess. 2 (1937); H. R. Rep. No. 1452, 75th Cong., 1st Sess. 6 (1937). *Joint Hearings on S. 2475 and H. R. 7200 Before the Sen. Comm. on Education and Labor and the House Comm. on Labor*, 75th Cong., 1st Sess. pt. 1 at 2-3 (1937).

The 1974 Amendments extend coverage under the Act well beyond the scope of enterprises competing in interstate commerce (the basis of the 1966 amendments and the question presented in *Wirtz*) to all non-supervisory State and local Government employees engaged in essential noncompetitive governmental functions. The original purpose of the Act, to eliminate an unfair method of competition, remains a basic goal of the 1974 Amendments. As was noted in *Wirtz*, "The original Act stated Congress' findings and purposes as of

1938. Subsequent extensions of coverage were presumably based on similar findings and purposes with respect to the areas newly covered." 392 U.S. at 190 n. 13. Moreover, the 1974 Senate Committee Report implies that the elimination of competition in substandard wages and excessively long hours is a basic purpose of the 1974 Amendments. S. Rep. No. 690, 93 Cong., 2d Sess. 4 (1974). There is no testimony in the Hearings or congressional findings which indicates that State and local Governments engaging in activities such as police and fire protection and tax collection compete with other enterprises. On the contrary, both Appellee herein and his predecessor admitted that Congress had no rational basis, under the commerce power, to regulate non-competing Government functions. Secretary Hodgson stated:

> "We cannot support this proposal [extension of coverage to state and local Government employees]. In 1966, enterprise coverage was extended to employees of hospitals, nursing homes, schools and institutions of higher learning regardless of whether they were public or private or operated for profit or not for profit. Here the Congress took the position that failure to cover all such institutions would have resulted in failure to implement one of the basic purposes of the act – the elimination of conditions which constitute an unfair method of competition in commerce.
>
> "But extending coverage to all State and local employees is an entirely different matter. It would certainly involve the Federal Government in the regulation of the functions of State and local governments." *Hearings on H. R. 7130 Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 92 Cong., 1st Sess. pt. 1 at

552 (1971); *Hearings on S. 1861 & S. 2259 Before the Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess. pt. 1 at 29 (1971).

Similarly, Appellee Brennan testified in 1973:

> "I realize that the 1966 Amendments extended enterprise coverage to employees of hospitals, nursing homes, schools and institutions of higher learning regardless of whether they were public or private or operated for profit or not for profit.
>
> "The reason for the extension to this group of employees was that failure to cover all employees of such institutions would constitute an unfair method of competition in commerce.
>
> "However, extension of coverage to all State and local government employees is too great an interference with State prerogatives.
>
> "Imposition of the Federal standard for coverage, particularly for overtime, could have a disruptive impact on many State civil service systems and the additional costs could overburden many small governmental units." *Hearings on H. R. 4757 & H. R. 2831 Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 263 (1973).

In his veto of H. R. 7935, the original bill on this subject, in a message to Congress on September 6, 1973, 119 Cong. Rec. H. 7596 (daily ed. Sep. 6, 1973), President Nixon said of the proposed Amendments to the Act:

> "Extension of Federal minimum wage and overtime standards to State and local government employees is an unwarranted interference with State prerogatives and has been opposed by the Advisory Commission on Intergovernmental Relations."

Likewise, in his letter of February 27, 1974, to Senator Harrison Williams, 120 Cong. Rec. S. 2516 (daily ed. Feb. 28, 1974) President Nixon recognized "the need for enacting a responsible minimum wage bill. . .", but cautioned:

> "The extension of the Federal minimum wage and overtime requirements to State and local Government employees is also a problem. I appreciate the fact that the House bill under consideration tries to avoid undue interference in the operations of these Governments by exempting police and firemen from the overtime requirements. However, I continue to agree with the Advisory Commission on Intergovernmental Relations that, in general, additional Federal requirements affecting the relationship between these governments and their employees is an unnecessary interference with their prerogatives. The available evidence has failed to convince me that these governments are not acting responsibly in setting their wage and salary rates to meet local conditions. Additionally, if the Congress desires to make the minimum wage and overtime laws applicable to Federal employees, who are already adequately protected by other laws, it should place enforcement responsibility in the Civil Service Commission, which has the responsibility under the other laws."

The conclusion to be drawn from the test enunciated in *Wirtz* is that such a limit on the commerce power in no way upsets or contradicts the interpretation of that power which has existed for longer than the Fair Labor Standards Act itself. Thus, in *United States v. California*, 297 U.S. 175, the distinction was easily made when California sought to resist application of the Federal Applicance Safety Act to its State-owned

railroad. The Court, in rejecting the State's claim, concluded:

> "California, by engaging in interstate commerce by rail, has subjected itself to the commerce power and is liable for a violation of the Safety Appliance Act, as are other carriers.
>
> * * *
>
> "No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection." 297 U.S. at 185.

However, a State's sovereign, non-competitive, unique functions cannot be regulated under the Commerce Clause. These functions have no rational relation to commerce such as to create a constitutional basis for their regulation under the Commerce Clause. In fact, the cases since *United States v. California* reinforce the distinction made there. In both *California v. United States*, 320 U.S. 577, 580, and *Case v. Bowles*, 327 U.S. 92, 100-101, a finding of competition with private enterprises was the *sine qua non* of Federal Regulation of State activities.

The District Court in this case found in its Order, Findings and Opinion, attached hereto as Appendix A:

> "The institutions whose employees are in question here perform governmental functions, not seriously in competition with private industry." (App. at 7a).

Federal officials have, as stated above, admitted that the 1974 Amendments irrationally usurp State and City

decision-making, protected by the Tenth Amendment. Former Secretary of Labor James Hodgson said in opposing the imposition of Federal control over State and City labor union relations, *Hearings on H. R. 12532, H. R. 7684, H. R. 9324 Before Special Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 2d Sess. 281-83 (1972):

> "The States are taking advantage of this opportunity to adapt various public sector labor relations models to their local needs. The past six years has been a period of great activity in public sector labor relations at the State level. Not only have States developed various initial approaches to public sector labor relations, but they are refining and perfecting these approaches on the basis of their experience. For example, Wisconsin and New York have both amended their comprehensive statutes. Minnesota has replaced two 'meet and confer' laws with one collective bargaining statute. Connecticut is involved in a major legislative study of possible revision of its law. Thus, the States are not neglecting the problems of labor and management in the public sector. Rather than being detrimental as in the private sector, experimentation on a State-by-State basis in the public sector takes into account important State differences and contributes substantially to our understanding of the issues in public sector labor relations. This process of development should not be interrupted when there is no urgency for Federal legislation. Under these circumstances, variation rather than uniformity among the States is the more valuable pattern for policy development."

If this Act is upheld, the already proposed legislation covering State and City labor union relations under the

National Labor Relations Act, 29 U.S.C. §141 *et seq.*, is clearly the next step.

d. Federalism is dead if this Act is upheld as applied to States.

In recognition of "Our Federalism", this Court in *New York v. United States*, 326 U.S. 572, agreed that "there are, of course, State activities . . . that partake of uniqueness from the point of view of intergovernmental relations", 326 U.S. at 582 (opinion of Frankfurter, J.), so that the national Government may not "interfere unduly with the State's performance of its sovereign functions of government", 326 U.S. at 587 (concurring opinion of Stone, C.J.); this is so because "[t]he notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system." 326 U.S. at 594 (dissenting opinion of Douglas, J.). This analysis of constitutionally protected essential State functions is as applicable to the commerce power here as it was to the taxing power in *New York*.

This is the same distinction which was analyzed with respect to the Eleventh Amendment in *Employees v. Missouri Public Health Dep't*, 411 U.S. at 279, where this Court said:

> "It is true that, as the Court said in Parden [v. Terminal R. Co., 377 U.S. 194], 'the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.' 377 U.S. at 191, 12 L. Ed. 2d 233. But

> we decline to extend Parden to cover every exercise by Congress of its commerce power, where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States and putting the States on the same footing as other employers is not clear." 411 U.S. at 286-87.

The Court below failed to recognize the inapplicability of *Wirtz* in searching for a rational basis to congressional legislation "lifting the sovereignty of the States". Although it dismissed the Complaint, the Court below, in its Order of December 31, 1974, recognized this lack of rational basis. (App. at 7a-8a). The District Court erroneously dismissed the Complaint and that Order should be reviewed and reversed by this Court.

State and local variety and State and local autonomy have been meaningful principles to which the renowned success of our governmental system of shared powers and responsibility called "Federalism" is attributed. In the area of personnel management and practices many differences exist across our Nation. State and local conditions have dictated these to meet local public service needs. (Pritchard Deposition at 150-151). Mandating compliance with fixed uniform Nation-wide Federal requirements is not in the public interest and is certainly destructive of essential public service by unreasonably and unnecessarily increasing its costs. (Pritchard Deposition at 158-169). See *Younger v. Harris*, 401 U.S. 37, 44, stating:

> " 'The notion of comity', that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare

best if the States and their institutions are left free to perform their separate functions in their seperate ways. . ."

Most confusingly disastrous here is the impact of the 1974 Amendments on local public service volunteerism, especially the some 2,000,000 volunteer firemen. (Pritchard Deposition at 119-120, 169-172). While true volunteers are not covered by the 1974 Amendments, some volunteers are purposely "paid" just enough money to get them covered by workmen's compensation in case of injury (Complaint ¶ 28). These volunteers are now covered by the Act's Amendments. Because of the few dollars received for workmen's compensation purposes, all hours worked must now be paid for. The localities cannot afford to pay the Act's mandated wages. Without these volunteer workers, local government fire protection is difficult or impossible of operation. Being unable to pay the full wages and overtime required means closing down of this essential public service. (Pritchard Deposition at 154-55, 167-71).

Volunteerism is a peculiar American concept largely unknown in other parts of the world. Here no commerce is involved and no competition is involved. The confusion and damage to the public interest by the Act's applicability to partly paid volunteers is a devastating, irrational result.

CONCLUSION

It is urged that for the reasons given above the questions presented herein are substantial. This Court should note probable jurisdiction of this appeal.

The District Court, after the contentions stated herein were presented to it, stated:

> "We are troubled by these contentions and consider that they are substantial and that it may well be that the Supreme Court will feel it appropriate to draw back from the far-reaching implications of *Wirtz*; but that is a decision that only the Supreme Court can make, and as a Federal District Court we feel obliged to apply the *Wirtz* opinion as it stands." (App. at 9a)

What this Court expressly said in *Wirtz* was a very limited decision as to limited concepts and subjects and should not now be stretched to engulf the whole of State and City Governments and thus become an unlimited decision. *Wirtz* did not envision such a "giant" take over.

Respectfully submitted on behalf of all Counsel,

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APPENDIX

APPENDIX A

DECISION OF DISTRICT COURT

FILED
DEC 31, 1974
JAMES F. DAVEY, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NATIONAL LEAGUE OF CITIES,
an Illinois Corporation,
on behalf of its member cities,
1620 Eye Street, N.W.,
Washington, D.C. 20006,

Civil Action
No. 74-1812

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by and through
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behalf of the People of
the State of California,

RONALD REAGAN
Governor,

VERNE ORR
Director, Department of Finance,

JAMES G. STEARNS
Secretary, Agriculture and Services Agency,

FRANK J. WALTON
Secretary, Business and Transportation Agency,

NORMAN B. LIVERMORE, JR.
Secretary, Resources Agency,

JAMES E. JENKINS
Secretary, Health and Welfare Agency,

Plaintiffs-Intervenors,

and

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Plaintiffs-Intervenors,

v.

The Honorable PETER J. BRENNAN
Secretary of Labor
of the United States,

Defendant.

Per Curiam:

Petitioners, individual cities and states, the National League of Cities, and the National Governors' Conference, challenge the 1974 amendments to the Fair Labor Standards Act (FLSA), Public Law 93-259, 88 Stat. 55, amending 29 U.S.C. § § 201 *et seq.* (1970), as beyond the power of Congress under the Commerce Clause in that they purport to extend the coverage of the FLSA to nonsupervisory state and municipal employees, including police and firemen. The amendments generally went into effect on May 1, 1974; provisions relating to overtime pay of police and firemen become effective on January 1, 1975. Plaintiffs seek a declaratory judgment and temporary and permanent injunctive relief. Defendant opposed a temporary injunction, and moved to dismiss the action for failure to state a claim upon which relief can be granted. A three-judge district court was duly convened. We grant defendant's motion to dismiss the complaint.

Although plaintiffs have raised a difficult and substantial question of law, we feel that our decision is controlled by the decision of the Supreme Court in *Maryland v. Wirtz*, 392 U.S. 183 (1968).[1] Upholding the constitutionality of an earlier extension of the FLSA to cover employees of state-operated schools and hospitals against an attack similar to that lodged here,

[1] In this opinion we have not addressed ourselves to any issue concerning the regulations and rulings issued by defendant under the 1974 amendments, either as to procedure followed, or as to substantive compliance with the Act. These issues were not the core of the complaint filed, and the contentions may be presented by plaintiffs either by way of defense, or in actions for declaratory relief. *See* National Automatic Laundry and Cleaning Council v. Shultz, 143 U.S.App.D.C. 274, 443 F.2d 689 (1971).

Justice Harlan, writing for the court, found a sufficient and independent rational relationship of the provisions of the Act to interstate commerce in that state hospitals and schools were significant purchasers of out-of-state goods and that strikes and work stoppages involving their employees would consequently interrupt and burden the flow of goods across state lines. 392 U.S. at 194-95. Since it is uncontested that the state and municipal institutions whose employees are reached for the first time by the 1974 Amendments do make substantial purchases in interstate commerce of equipment and other goods, the decision in *Wirtz* disposes of this case.

Although the theory described above was an explicitly independent ground for the decision, there is language in the opinion that stresses that the state competes with private institutions which also operate schools and hospitals.[2] The institutions whose employees are in question here perform governmental functions, not seriously in competition with private industry. Moreover, there is evidence that the impact of the 1974 Amendments, in terms of confusing and complex regulations and an enormous fiscal burden on the states, is so extensive that it may seriously affect the structuring of state and municipal governmental activities by reducing flexibility to adapt to local and special circumstances, as through compensatory time off

[2] *See, e.g.*, "If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation." 392 U.S. at 197.

arrangements, rather than time and half overtime pay, and through other local governmental agreements.[3]

Plaintiffs contend that the amendments will mean either increase in local government fiscal requirements. or reduction in services and personnel, with layoffs, or both, due to provisions in state and municipal constitutions, charters, statutes and ordinances, like those against deficit financing. Plaintiffs further contend that a large part of the budgets of state and local governments reflect costs of non-supervisory personnel, and that the budgeting processes currently under way indicate that the amendments may have the practical impact of a large scale reconstitution of tours of duty, without any factual predicate showing that there has

[3]California, for example, has a mutual aid program, through which counties cooperate to provide aid in time of floods and other disasters. The municipalities and counties participate gratuitously, without reimbursement. Counsel for California fear that the overtime pay provisions of the Amendments will prove so burdensome that counties will be unwilling to continue to cooperate in this venture.

Also, compensatory time-off arrangements which allow for heavy working seasons during the summer, for forest fire fighters, or during the winter, for snow removal personnel, may be prohibited by the provisions requiring overtime payment. California, for example, represents that its forestry service employees are under special arrangements for the 5-8 month forest fire campaign program, which are dependent as a practical matter on a compensatory time off arrangement during the winter months. Salt Lake City fears it may not be able to continue its practice of working its snow removal employees some 7,000 hours in excess of 40 hours per week during the winter with an equal amount of time off during the summer, despite the apparent acceptability of this arrangement to both employer and employees.

been in the past any substantial degree of either widespread labor unrest curtailing flow of interstate commerce or substandard wage scales. They contend that the amendments here will intrude upon the state's performance of essential governmental functions far more than did those reviewed in *Wirtz*, although here, as there, the federal requirements are nominally limited to wage and hour regulations. We are troubled by these contentions, and consider that they are substantial and that it may well be that the Supreme Court will feel it appropriate to draw back from the far-reaching implications of *Wirtz*; but that is a decision that only the Supreme Court can make, and as a Federal district court we feel obliged to apply the *Wirtz* opinion as it stands.

If, as we must assume, the amendments are constitutional, a preliminary injunction would be inappropriate. We have pondered the possibility of relief pending appeal, to assure opportunity to litigate, but, apart from jurisdictional doubts, we apprehend that the only assistance available from such relief would be this, that states failing to comply with the new provisions would not be exposed to the liquidated damages and double damage penalties provided for bad faith violations of the Act. However, we feel that since our opinion recognizes that plaintiffs have raised a substantial question regarding the amendments' constitutionality, this will be sufficient to indicate that the claim of the part of the cities and states that the Act cannot be constitutionally enforced has been raised in good faith.

Plaintiffs' request for declaratory and preliminary injunctive relief is denied. Defendant's motion for

dismissal is hereby granted. Because the papers before us include depositions and affidavits, and they should be part of the record in the event of an appeal to the Supreme Court, our order dismissing the complaint will be entered under both Rule 12 and Rule 56 of the Federal Rules of Civil Procedure.

The foregoing will constitute our findings of fact and conclusions of law.

Accordingly, it is hereby ORDERED, pursuant to and in accordance with Rules 12 and 56 of the Federal Rules of Civil Procedure, that the complaint of the National League of Cities, et al., as amended December 31, 1974, and the complaint in intervention of the State of California, be, and they hereby are, dismissed with prejudice.

/s/ Harold Leventhal
Harold Leventhal
United States Circuit Judge

/s/ Oliver Gasch
Oliver Gasch
United States District Judge

/s/ Barrington D. Parker
Barrington D. Parker
United States District Judge

December 31, 1974

APPENDIX B
1974 AMENDMENTS TO FAIR LABOR STANDARDS ACT

Public Law 93-259
93rd Congress, S. 2747
April 8, 1974

An Act

To amend the Fair Labor Standards Act of 1938 to increase the minimum wage rate under that Act, to expand the coverage of the Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Fair Labor Standards Amendments of 1974.

SHORT TITLE; REFERENCES TO ACT

SECTION 1. (a) This Act may be cited as the "Fair Labor Standards Amendments of 1974". 29 USC 203 note.

(b) Unless otherwise specified, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the section or other provision amended or repealed is a section or other provision of the Fair Labor Standards Act of 1938 (29 U.S.C. 201-219). 52 Stat. 1060.

INCREASE IN MINIMUM WAGE RATE FOR EMPLOYEES COVERED BEFORE 1966

SEC. 2. Section 6(a)(1) is amended to read as follows: 80 Stat. 838.
"(1) not less than $2 an hour during the period ending December 31, 1974, not less than $2.10 an hour during the year beginning January 1, 1975, and not less than $2.30 an hour after December 31, 1975, except as otherwise provided in this section;". 29 USC 206.

INCREASE IN MINIMUM WAGE RATE FOR NONAGRICULTURAL EMPLOYEES COVERED IN 1966 AND 1974

SEC. 3. Section 6(b) is amended (1) by inserting ", title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments of 1974" after "1966", and (2) by striking out paragraphs (1) through (5) and inserting in lieu thereof the following: 86 Stat. 373. 20 USC 1681.
"(1) not less than $1.90 an hour during the period ending December 31, 1974,
"(2) not less than $2 an hour during the year beginning January 1, 1975,
"(3) not less than $2.20 an hour during the year beginning January 1, 1976, and
"(4) not less than $2.30 an hour after December 31, 1976."

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INCREASE IN MINIMUM WAGE RATE FOR AGRICULTURAL EMPLOYEES

SEC. 4. Section 6(a)(5) is amended to read as follows:
"(5) if such employee is employed in agriculture, not less than—
"(A) $1.60 an hour during the period ending December 31, 1974,
"(B) $1.80 an hour during the year beginning January 1, 1975,
"(C) $2 an hour during the year beginning January 1, 1976,
"(D) $2.20 an hour during the year beginning January 1, 1977, and
"(E) $2.30 an hour after December 31, 1977."

INCREASE IN MINIMUM WAGE RATES FOR EMPLOYEES IN PUERTO RICO AND THE VIRGIN ISLANDS

SEC. 5. (a) Section 5 is amended by adding at the end thereof the following new subsection: 63 Stat. 911. 29 USC 205.

31 536 01

Infra.
63 Stat. 915;
75 Stat. 70.
29 USC 208.

"(e) The provisions of this section, section 6(c), and section 8 shall not apply with respect to the minimum wage rate of any employee employed in Puerto Rico or the Virgin Islands (1) by the United States or by the government of the Virgin Islands, (2) by an establishment which is a hotel, motel, or restaurant, or (3) by any other retail or service establishment which employs such employee primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs. The minimum wage rate of such an employee shall be determined under this Act in the same manner as the minimum wage rate for employees employed in a State of the United States is determined under this Act. As used in the preceding sentence, the term 'State' does not include a territory or possession of the United States.".

80 Stat. 839.
29 USC 206.

(b) Effective on the date of the enactment of the Fair Labor Standards Amendments of 1974, subsection (c) of section 6 is amended by striking out paragraphs (2), (3), and (4) and inserting in lieu thereof the following:

"(2) Except as provided in paragraphs (4) and (5), in the case of any employee who is covered by such a wage order on the date of enactment of the Fair Labor Standards Amendments of 1974 and to whom the rate or rates prescribed by subsection (a) or (b) would otherwise apply, the wage rate applicable to such employee shall be increased as follows:

"(A) Effective on the effective date of the Fair Labor Standards Amendments of 1974, the wage order rate applicable to such employee on the day before such date shall—

"(i) if such rate is under $1.40 an hour, be increased by $0.12 an hour, and

"(ii) if such rate is $1.40 or more an hour, be increased by $0.15 an hour.

88 STAT. 56
88 STAT. 57

"(B) Effective on the first day of the second and each subsequent year after such date, the highest wage order rate applicable to such employees on the date before such first day shall—

"(i) if such rate is under $1.40 an hour, be increased by $0.12 an hour, and

"(ii) if such rate is $1.40 or more an hour, be increased by $0.15 an hour.

In the case of any employee employed in agriculture who is covered by a wage order issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 5, to whom the rate or rates prescribed by subsection (a)(5) would otherwise apply, and whose hourly wage is increased above the wage rate prescribed by such wage order by a subsidy (or income supplement) paid, in whole or in part, by the government of Puerto Rico, the increases prescribed by this paragraph shall be applied to the sum of the wage rate in effect under such wage order and the amount by which the employee's hourly wage rate is increased by the subsidy (or income supplement) above the wage rate in effect under such wage order.

Ante, p. 56

"(3) In the case of any employee employed in Puerto Rico or the Virgin Islands to whom this section is made applicable by the amendments made to this Act by the Fair Labor Standards Amendments of 1974, the Secretary shall, as soon as practicable after the date of enactment of the Fair Labor Standards Amendments of 1974, appoint a special industry committee in accordance with section 5 to recommend the highest minimum wage rate or rates, which shall be not less than 60 per centum of the otherwise applicable minimum wage rate in effect

under subsection (b) or $1.00 an hour, whichever is greater, to be applicable to such employee in lieu of the rate or rates prescribed by subsection (b). The rate recommended by the special industry committee shall (A) be effective with respect to such employee upon the effective date of the wage order issued pursuant to such recommendation, but not before sixty days after the effective date of the Fair Labor Standards Amendments of 1974, and (B) except in the case of employees of the government of Puerto Rico or any political subdivision thereof, be increased in accordance with paragraph (2)(B).

"(4)(A) Notwithstanding paragraph (2)(A) or (3), the wage rate of any employee in Puerto Rico or the Virgin Islands which is subject to paragraph (2)(A) or (3) of this subsection, shall, on the effective date of the wage increase under paragraph (2)(A) or of the wage rate recommended under paragraph (3), as the case may be, be not less than 60 per centum of the otherwise applicable rate under subsection (a) or (b) or $1.00, whichever is higher.

"(B) Notwithstanding paragraph (2)(B), the wage rate of any employee in Puerto Rico or the Virgin Islands which is subject to paragraph (2)(B), shall, on and after the effective date of the first wage increase under paragraph (2)(B), be not less than 60 per centum of the otherwise applicable rate under subsection (a) or (b) or $1.00, whichever is higher.

88 STAT. 57
88 STAT. 58

"(5) If the wage rate of an employee is to be increased under this subsection to a wage rate which equals or is greater than the wage rate under subsection (a) or (b) which, but for paragraph (1) of this subsection, would be applicable to such employee, this subsection shall be inapplicable to such employee and the applicable rate under such subsection shall apply to such employee.

"(6) Each minimum wage rate prescribed by or under paragraph (2) or (3) shall be in effect unless such minimum wage rate has been superseded by a wage order (issued by the Secretary pursuant to the recommendation of a special industry committee convened under section 8) fixing a higher minimum wage rate."

Infra.
63 Stat. 915;
69 Stat. 711.
29 USC 208.
Ante, p. 55.
Ante, p. 56.

(c)(1) The last sentence of section 8(b) is amended by striking out the period at the end thereof and inserting in lieu thereof a semicolon and the following: "except that the committee shall recommend to the Secretary the minimum wage rate prescribed in section 6(a) or 6(b), which would be applicable but for section 6(c), unless there is substantial documentary evidence, including pertinent unabridged profit and loss statements and balance sheets for a representative period of years or in the case of employees of public agencies other appropriate information, in the record which establishes that the industry, or a predominant portion thereof, is unable to pay that wage."

(2) The third sentence of section 10(a) is amended by inserting after "modify" the following: "(including provision for the payment of an appropriate minimum wage rate)".

69 Stat. 712;
72 Stat. 948.
29 USC 210.

(d) Section 8 is amended (1) by striking out "the minimum wage prescribed in paragraph (1) of section 6(a) in each such industry" in the first sentence of subsection (a) and inserting in lieu thereof "the minimum wage rate which would apply in each such industry under paragraph (1) or (5) of section 6(a) but for section 6(c)", (2) by striking out "the minimum wage rate prescribed in paragraph (1) of section 6(a)" in the last sentence of subsection (a) and inserting in lieu thereof "the otherwise applicable minimum wage rate in effect under paragraph (1) or (5) of section 6(a)", and (3) by striking out "prescribed in paragraph (1) of section 6(a)" in subsection (c) and inserting in lieu thereof "in effect under paragraph (1) or (5) of section 6(a) (as the case may be)".

75 Stat. 70.

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FEDERAL AND STATE EMPLOYEES

"Employer."
52 Stat. 1060; 80 Stat. 830. 29 USC 203.

SEC. 6. (a) (1) Section 3(d) is amended to read as follows:

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization."

"Employee."
80 Stat. 832.

(2) Section 3(e) is amended to read as follows:

"(e) (1) Except as provided in paragraphs (2) and (3), the term 'employee' means any individual employed by an employer.

88 STAT. 58
88 STAT. 59

"(2) In the case of an individual employed by a public agency, such term means—

"(A) any individual employed by the Government of the United States—

"(i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code),

80 Stat. 378.

"(ii) in any executive agency (as defined in section 105 of such title),

"(iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,

"(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

"(v) in the Library of Congress;

"(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

"(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

"(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

"(ii) who—

"(I) holds a public elective office of that State, political subdivision, or agency,

"(II) is selected by the holder of such an office to be a member of his personal staff,

"(III) is appointed by such an officeholder to serve on a policymaking level, or

"(IV) who is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office.

"(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.".

"Industry."
52 Stat. 1060.

(3) Section 3(h) is amended to read as follows:

"(h) 'Industry' means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.".

75 Stat. 65; 86 Stat. 375.

(4) Section 3(r) is amended by inserting "or" at the end of paragraph (2) and by inserting after that paragraph the following new paragraph:

"(3) in connection with the activities of a public agency,".

80 Stat. 831; 86 Stat. 375.

(5) Section 3(s) is amended—

(A) by striking out in the matter preceding paragraph (1) "including employees handling, selling, or otherwise working on goods" and inserting in lieu thereof "or employees handling, selling, or otherwise working on goods or materials",

88 STAT. 60
80 Stat. 831.
29 USC 203.

(B) by striking out "or" at the end of paragraph (3),

(C) by striking out the period at the end of paragraph (4) and inserting in lieu thereof "; or",

(D) by adding after paragraph (4) the following new paragraph:

"(5) is an activity of a public agency.", and

(E) by adding after the last sentence the following new sentence: "The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.".

"Public agency."
52 Stat. 1060; 80 Stat. 832.

(6) Section 3 is amended by adding after subsection (w) the following:

"(x) 'Public agency' means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.".

75 Stat. 66. 29 USC 204.

(b) Section 4 is amended by adding at the end thereof the following new subsection:

"(f) The Secretary is authorized to enter into an agreement with the Librarian of Congress with respect to individuals employed in the Library of Congress to provide for the carrying out of the Secretary's functions under this Act with respect to such individuals. Notwithstanding any other provision of this Act, or any other law, the Civil Service Commission is authorized to administer the provisions of this Act with respect to any individual employed by the United States (other than an individual employed in the Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority). Nothing in this subsection shall be construed to affect the right of an employee to bring an action for unpaid minimum wages, or unpaid overtime compensation, and liquidated damages under section 16(b) of this Act.".

29 USC 216.
52 Stat. 1063; 80 Stat. 842.
29 USC 207.

(c) (1) (A) Effective January 1, 1975, section 7 is amended by adding at the end thereof the following new subsection:

"(k) No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

"(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed 240 hours; or

"(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 240 hours bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed."

Effective date. Supra.

(B) Effective January 1, 1976, section 7(k) is amended by striking out "240 hours" each place it occurs and inserting in lieu thereof "232 hours".

Effective date.

(C) Effective January 1, 1977, such section is amended by striking out "232 hours" each place it occurs and inserting in lieu thereof "216 hours".

88 STAT. 61

Effective date. Ante, p. 60.

(D) Effective January 1, 1978, such section is amended—

(i) by striking out "exceed 216 hours" in paragraph (1) and inserting in lieu thereof "exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975"; and

(ii) by striking out "as 216 hours bears to 28 days" in paragraph (2) and inserting in lieu thereof "as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days".

75 Stat. 71; 80 Stat. 837. 29 USC 213.

(2)(A) Section 13(b) is amended by striking out the period at the end of paragraph (19) and inserting in lieu thereof "; or" and by adding after that paragraph the following new paragraph:

"(20) any employee of a public agency who is employed in fire protection or law enforcement activities (including security personnel in correctional institutions);".

Effective date. Supra.

(B) Effective January 1, 1975, section 13(b)(20) is amended to read as follows:

"(20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or".

Studies. 29 USC 213 note.

(3) The Secretary of Labor shall in the calendar year beginning January 1, 1976, conduct (A) a study of the average number of hours in tours of duty in work periods in the preceding calendar year of employees (other than employees exempt from section 7 of the Fair Labor Standards Act of 1938 by section 13(b)(20) of such Act) of public agencies who are employed in fire protection activities, and (B) a study of the average number of hours in tours of duty in work periods in the preceding calendar year of employees (other than employees exempt from section 7 of the Fair Labor Standards Act of 1938 by section 13(b)(20) of such Act) of public agencies who are employed in law enforcement activities (including security personnel in correctional institutions). The Secretary shall publish the results of each such study in the Federal Register.

Supra.

Publication in Federal Register. 52 Stat. 1069; 75 Stat. 74. 29 USC 216.

(d)(1) The second sentence of section 16(b) is amended to read as follows: "Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.".

Statute of limitation, suspension. 61 Stat. 87. 29 USC 255.

(2)(A) Section 6 of the Portal-to-Portal Pay Act of 1947 is amended by striking out the period at the end of paragraph (c) and by inserting in lieu thereof a semicolon and by adding after such paragraph the following:

Supra.

"(d) with respect to any cause of action brought under section 16(b) of the Fair Labor Standards Act of 1938 against a State or a political subdivision of a State in a district court of the United States on or before April 18, 1973, the running of the statutory periods of limitation shall be deemed suspended during the period beginning with the commencement of any such action and ending one hundred and eighty days after the effective date of the Fair Labor Standards Amendments of 1974, except that such suspension shall not be applicable if in such action judg-

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88 STAT. 62

ment has been entered for the defendant on the grounds other than State immunity from Federal jurisdiction.".

(B) Section 11 of such Act is amended by striking out "(b)" after "section 16". 61 Stat. 89. 29 USC 260.

DOMESTIC SERVICE WORKERS

SEC. 7. (a) Section 2(a) is amended by inserting at the end the following new sentence: "That Congress further finds that the employment of persons in domestic service in households affects commerce." 52 Stat. 1060; 63 Stat. 910. 29 USC 202.

(b)(1) Section 6 is amended by adding after subsection (e) the following new subsection: 80 Stat. 841. 29 USC 206.

"(f) Any employee—

"(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under section 6(b) unless such employee's compensation for such service would not because of section 209(g) of the Social Security Act constitute wages for the purposes of title II of such Act, or 64 Stat. 492; 68 Stat. 1078. 42 USC 409.

"(2) who in any workweek—

"(A) is employed in domestic service in one or more households, and

"(B) is so employed for more than 8 hours in the aggregate,

shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under section 6(b)." Ante, p. 55.

(2) Section 7 is amended by adding after the subsection added by section 6(c) of this Act the following new subsection: Ante, p. 60.

"(l) No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a)."

(3) Section 13(a) is amended by adding at the end the following new paragraph: 75 Stat. 71; 80 Stat. 838. 29 USC 213.

"(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)."

(4) Section 13(b) is amended by adding after the paragraph added by section 6(c) the following new paragraph: Ante, p. 61.

"(21) any employee who is employed in domestic service in a household and who resides in such household; or".

RETAIL AND SERVICE ESTABLISHMENTS

SEC. 8. (a) Effective January 1, 1975, section 13(a)(2) (relating to employees of retail and service establishments) is amended by striking out "$250,000" and inserting in lieu thereof "$225,000". Effective date. 80 Stat. 833.

(b) Effective January 1, 1976, such section is amended by striking out "$225,000" and inserting in lieu thereof "$200,000". Effective date.

(c) Effective January 1, 1977, such section is amended by striking out "or such establishment has an annual dollar volume of sales which is less than $200,000 (exclusive of excise taxes at the retail level which are separately stated)". Effective date.

TOBACCO EMPLOYEES

SEC. 9. (a) Section 7 is amended by adding after the subsection added by section 7(b)(2) of this Act the following: Supra.

"(m) For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if such employee—

"(1) is employed by such employer—

"(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

"(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

"(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

"(2) receives for—

"(A) such employment by such employer which is in excess of ten hours in any workday, and

"(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.".

Repeal. 75 Stat. 71; 80 Stat. 838. 29 USC 213. Ante, p. 62.

(b)(1) Section 13(a)(14) is repealed.

(2) Section 13(b) is amended by adding after the paragraph added by section 7(b)(4) of this Act the following new paragraph:

"(22) any agricultural employee employed in the growing and harvesting of shade-grown tobacco who is engaged in the processing (including, but not limited to, drying, curing, fermenting, bulking, rebulking, sorting, grading, aging, and baling) of such tobacco, prior to the stemming process, for use as cigar wrapper tobacco; or".

TELEGRAPH AGENCY EMPLOYEES

Repeal.

SEC. 10. (a) Section 13(a)(11) (relating to telegraph agency employees) is repealed.

Supra.

(b)(1) Section 13(b) is amended by adding after the paragraph added by section 9(b)(2) of this Act the following new paragraph:

"(23) any employee or proprietor in a retail or service establishment which qualifies as an exempt retail or service establishment under paragraph (2) of subsection (a) with respect to whom the provisions of sections 6 and 7 would not otherwise apply, who is engaged in handling telegraphic messages for the public under an agency or contract arrangement with a telegraph company where the telegraph message revenue of such agency does not exceed $500 a month, and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or".

Ante, pp. 55, 60.

Effective date.

(2) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, section 13(b)(23) is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours".

(3) Effective two years after such date, section 13(b)(23) is repealed.

Repeal; effective date. Ante, p. 63.

SEAFOOD CANNING AND PROCESSING EMPLOYEES

SEC. 11. (a) Section 13(b)(4) (relating to fish and seafood processing employees) is amended by inserting "who is" after "employee", and by inserting before the semicolon the following: ", and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed".

75 Stat. 71. 29 USC 213.

(b) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, section 13(b)(4) is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours".

Effective date.

(c) Effective two years after such date, section 13(b)(4) is repealed.

Repeal; effective date.

NURSING HOME EMPLOYEES

SEC. 12. (a) Section 13(b)(8) (insofar as it relates to nursing home employees) is amended by striking out "any employee who (A) is employed by an establishment which is an institution (other than a hospital) primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises" and the remainder of that paragraph.

80 Stat. 833.

(b) Section 7(j) is amended by inserting after "a hospital" the following: "or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises".

80 Stat. 842. 29 USC 207.

HOTEL, MOTEL, AND RESTAURANT EMPLOYEES AND TIPPED EMPLOYEES

SEC. 13. (a) Section 13(b)(8) (insofar as it relates to hotel, motel, and restaurant employees) (as amended by section 12) is amended (1) by striking out "any employee" and inserting in lieu thereof "(A) any employee (other than an employee of a hotel or motel who performs maid or custodial services) who is", (2) by inserting before the semicolon the following: "and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed", and (3) by adding after such section the following:

Supra.

"(B) any employee of a hotel or motel who performs maid or custodial services and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or".

(b) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, subparagraphs (A) and (B) of section 13(b)(8) are each amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-six hours".

Effective date.

(c) Effective two years after such date, subparagraph (B) of section 13(b)(8) is amended by striking out "forty-six hours" and inserting in lieu thereof "forty-four hours".

Effective date.

(d) Effective three years after such date, subparagraph (B) of section 13(b)(8) is repealed and such section is amended by striking out "(A)".

Repeal; effective date.

(e) The last sentence of section 3(m) is amended to read as follows: "In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an

80 Stat. 830. 29 USC 203.

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amount in excess of 50 per centum of the applicable minimum wage rate, except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.".

SALESMEN, PARTSMEN, AND MECHANICS

80 Stat. 836. 29 USC 213.

SEC. 14. Section 13(b)(10) (relating to salesmen, partsmen, and mechanics) is amended to read as follows:

"(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

"(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or".

FOOD SERVICE ESTABLISHMENT EMPLOYEES

SEC. 15. (a) Section 13(b)(18) (relating to food service and catering employees) is amended by inserting immediately before the semicolon the following: "and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed".

Effective date.

(b) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, such section is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours".

Repeal; effective date.

(c) Effective two years after such date, such section is repealed.

BOWLING EMPLOYEES

Effective date.

SEC. 16. (a) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, section 13(b)(19) (relating to employees of bowling establishments) is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours".

Repeal; effective date.

(b) Effective two years after such date, such section is repealed.

SUBSTITUTE PARENTS FOR INSTITUTIONALIZED CHILDREN

Ante, p. 63.

SEC. 17. Section 13(b) is amended by inserting after the paragraph added by section 10(b)(1) of this Act the following new paragraph:

"(24) any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children—

"(A) who are orphans or one of whose natural parents is deceased, or

"(B) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than $10,000; or".

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EMPLOYEES OF CONGLOMERATES

SEC. 18. Section 13 is amended by adding at the end thereof the following:

52 Stat. 1067; 71 Stat. 514. 29 USC 213. Ante, p. 55.

"(g) The exemption from section 6 provided by paragraphs (2) and (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support the activities of the establishment employing such employee; and (2) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds $10,000,000 (exclusive of excise taxes at the retail level which are separately stated), except that the exemption from section 6 provided by paragraph (2) of subsection (a) of this section shall apply with respect to any establishment described in this subsection which has an annual dollar volume of sales which would permit it to qualify for the exemption provided in paragraph (2) of subsection (a) if it were in an enterprise described in section 3(s).".

Ante, p. 59.

SEASONAL INDUSTRY EMPLOYEES

SEC. 19. (a) Section 7(c) and 7(d) are each amended—

80 Stat. 835. 29 USC 207.

(1) by striking out "ten workweeks" and inserting in lieu thereof "seven workweeks", and

(2) by striking out "fourteen workweeks" and inserting in lieu thereof "ten workweeks".

(b) Section 7(c) is amended by striking out "fifty hours" and inserting in lieu thereof "forty-eight hours".

(c) Effective January 1, 1975, sections 7(c) and 7(d) are each amended—

Effective date.

(1) by striking out "seven workweeks" and inserting in lieu thereof "five workweeks", and

(2) by striking out "ten workweeks" and inserting in lieu thereof "seven workweeks".

(d) Effective January 1, 1976, sections 7(c) and 7(d) are each amended—

Effective date.

(1) by striking out "five workweeks" and inserting in lieu thereof "three workweeks", and

(2) by striking out "seven workweeks" and inserting in lieu thereof "five workweeks".

(e) Effective December 31, 1976, sections 7(c) and 7(d) are repealed.

Repeal; effective date.

COTTON GINNING AND SUGAR PROCESSING EMPLOYEES

SEC. 20. (a) Section 13(b)(15) is amended to read as follows:

80 Stat. 835.

"(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup; or".

(b)(1) Section 13(b) is amended by adding after paragraph (24)

Ante, p. 65.

the following new paragraph:

"(25) any employee who is engaged in ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities and who receives compensation for employment in excess of—

"(A) seventy-two hours in any workweek for not more than six workweeks in a year,

"(B) sixty-four hours in any workweek for not more than four workweeks in that year,

"(C) fifty-four hours in any workweek for not more than two workweeks in that year, and

"(D) forty-eight hours in any other workweek in that year,

at a rate not less than one and one-half times the regular rate at which he is employed; or".

Effective date. Ante, p. 66. (2) Effective January 1, 1975, section 13(b)(25) is amended—

(A) by striking out "seventy-two" and inserting in lieu thereof "sixty-six";

(B) by striking out "sixty-four" and inserting in lieu thereof "sixty";

(C) by striking out "fifty-four" and inserting in lieu thereof "fifty";

(D) by striking out "and" at the end of subparagraph (C); and

(E) by striking out "forty-eight hours in any other workweek in that year," and inserting in lieu thereof the following: "forty-six hours in any workweek for not more than two workweeks in that year, and

"(E) forty-four hours in any other workweek in that year,".

Effective date. (3) Effective January 1, 1976, section 13(b)(25) is amended—

(A) by striking out "sixty-six" in subparagraph (A) and inserting in lieu thereof "sixty";

(B) by striking out "sixty" in subparagraph (B) and inserting in lieu thereof "fifty-six";

(C) by striking out "fifty" and inserting in lieu thereof "forty-eight";

(D) by striking out "forty-six" and inserting in lieu thereof "forty-four"; and

(E) by striking out "forty-four" in subparagraph (E) and inserting in lieu thereof "forty".

Ante, p. 66. (c)(1) Section 13(b) is amended by adding after paragraph (25) the following new paragraph:

"(26) any employee who is engaged in the processing of sugar beets, sugar beet molasses, or sugarcane into sugar (other than refined sugar) or syrup and who receives compensation for employment in excess of—

"(A) seventy-two hours in any workweek for not more than six workweeks in a year,

"(B) sixty-four hours in any workweek for not more than four workweeks in that year,

"(C) fifty-four hours in any workweek for not more than two workweeks in that year, and

"(D) forty-eight hours in any other workweek in that year,

at a rate not less than one and one-half times the regular rate at which he is employed; or".

Effective date. (2) Effective January 1, 1975, section 13(b)(26) is amended—

(A) by striking out "seventy-two" and inserting in lieu thereof "sixty-six";

(B) by striking out "sixty-four" and inserting in lieu thereof "sixty";

(C) by striking out "fifty-four" and inserting in lieu thereof "fifty";

(D) by striking out "and" at the end of subparagraph (C); and

(E) by striking out "forty-eight hours in any other workweek in that year," and inserting in lieu thereof the following: "forty-six hours in any workweek for not more than two workweeks in that year, and

"(E) forty-four hours in any other workweek in that year,".

(3) Effective January 1, 1976, section 13(b)(26) is amended— Effective date.

(A) by striking out "sixty-six" in subparagraph (A) and inserting in lieu thereof "sixty"; Ante, p. 67.

(B) by striking out "sixty" in subparagraph (B) and inserting in lieu thereof "fifty-six";

(C) by striking out "fifty" and inserting in lieu thereof "forty-eight";

(D) by striking out "forty-six" and inserting in lieu thereof "forty-four"; and

(E) by striking out "forty-four" in subparagraph (E) and inserting in lieu thereof "forty".

LOCAL TRANSIT EMPLOYEES

SEC. 21. (a) Section 7 is amended by adding after the subsection added by section 9(a) of this Act the following new subsection: Ante, p. 62.

"(n) In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment."

(b)(1) Section 13(b)(7) (relating to employees of street, suburban or interurban electric railways, or local trolley or motorbus carriers) is amended by striking out ", if the rates and services of such railway or carrier are subject to regulation by a State or local agency" and inserting in lieu thereof the following: "(regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), if such employee receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed". 90 Stat. 836. 29 USC 213.

(2) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, such section is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours". Effective date.

(3) Effective two years after such date, such section is repealed. Repeal; effective date.

COTTON AND SUGAR SERVICES EMPLOYEES

SEC. 22. Section 13 is amended by adding after the subsection added by section 18 the following: Ante, p. 66.

"(h) The provisions of section 7 shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year to any employee who— Supra.

"(1) is employed by such employer—

"(A) exclusively to provide services necessary and incidental to the ginning of cotton in an establishment primarily engaged in the ginning of cotton;

"(B) exclusively to provide services necessary and incidental to the receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;

"(C) exclusively to provide services necessary and incidental to the receiving, handling, storing, and processing of cottonseed in an establishment primarily engaged in the receiving, handling, storing, and processing of cottonseed; or

"(D) exclusively to provide services necessary and incidental to the processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets; and

"(2) receives for—

"(A) such employment by such employer which is in excess of ten hours in any workday, and

"(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Any employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or section 7.". Ante, p. 68.

OTHER EXEMPTIONS

Repeal. 80 Stat. 836. 29 USC 213.

SEC. 23. (a)(1) Section 13(a)(9) (relating to motion picture theater employees) is repealed.

Ante, p. 67.

(2) Section 13(b) is amended by adding after paragraph (26) the following new paragraph:

"(27) any employee employed by an establishment which is a motion picture theater; or".

Repeal. 75 Stat. 71; 80 Stat. 838.

(b)(1) Section 13(a)(13) (relating to small logging crews) is repealed.

(2) Section 13(b) is amended by adding after paragraph (27) the following new paragraph:

"(28) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight.".

(c) Section 13(b)(2) (insofar as it relates to pipeline employees) is amended by inserting after "employer" the following: "engaged in the operation of a common carrier by rail and".

EMPLOYMENT OF STUDENTS

80 Stat. 842. 29 USC 214.

SEC. 24. (a) Section 14 is amended by striking out subsections (a), (b), and (c) and inserting in lieu thereof the following:

"SEC. 14. (a) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages, under special certificates issued pursuant to regulations of the Secretary, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Secretary shall prescribe. Ante, p. 55.

"(b)(1)(A) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special

certificate issued under a regulation or order provide, in accordance with subparagraph (B), for the employment, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6 or not less than $1.60 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) in retail or service establishments. Ante, p. 56. 80 Stat. 839. 29 USC 206.

"(B) Except as provided in paragraph (4)(B), during any month in which full-time students are to be employed in any retail or service establishment under certificates issued under this subsection the proportion of student hours of employment to the total hours of employment of all employees in such establishment may not exceed—

"(i) in the case of a retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) were covered by this Act before the effective date of the Fair Labor Standards Amendments of 1974—

"(I) the proportion of student hours of employment to the total hours of employment of all employees in such establishment for the corresponding month of the immediately preceding twelve-month period,

"(II) the maximum proportion for any corresponding month of student hours of employment to the total hours of employment of all employees in such establishment applicable to the issuance of certificates under this section at any time before the effective date of the Fair Labor Standards Amendments of 1974 for the employment of students by such employer, or

"(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment, whichever is greater;

"(ii) in the case of retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) are covered for the first time on or after the effective date of the Fair Labor Standards Amendments of 1974—

"(I) the proportion of hours of employment of students in such establishment to the total hours of employment of all employees in such establishment for the corresponding month of the twelve-month period immediately prior to the effective date of such Amendments,

"(II) the proportion of student hours of employment to the total hours of employment of all employees in such establishment for the corresponding month of the immediately preceding twelve-month period, or

"(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment, whichever is greater; or

"(iii) in the case of a retail or service establishment for which records of student hours worked are not available, the proportion of student hours of employment to the total hours of employment of all employees based on the practice during the immediately preceding twelve-month period in (I) similar establishments of the same employer in the same general metropolitan area in which such establishment is located, (II) similar establishments of the same or nearby communities if such establish-

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ment is not in a metropolitan area, or (III) other establishments of the same general character operating in the community or the nearest comparable community.

"Student hours of employment." For purpose of clauses (i), (ii), and (iii) of this subparagraph, the term 'student hours of employment' means hours during which students are employed in a retail or service establishment under certificates issued under this subsection.

"(2) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment, at a wage rate not less than 85 per centum of the wage rate in effect under section 6(a)(5) or not less than $1.30 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) in any occupation in agriculture.

Ante, p. 56.

80 Stat. 839. 29 USC 206.

"(3) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment by an institution of higher education, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6 or not less than $1.60 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) who are enrolled in such institution The Secretary shall by regulation prescribe standards and requirements to insure that this paragraph will not create a substantial probability of reducing the full-time employment opportunities of persons other than those to whom the minimum wage rate authorized by this paragraph is applicable.

Regulations

"(4)(A) A special certificate issued under paragraph (1), (2), or (3) shall provide that the student or students for whom it is issued shall, except during vacation periods, be employed on a part-time basis and not in excess of twenty hours in any workweek.

"(B) If the issuance of a special certificate under paragraph (1) or (2) for an employer will cause the number of students employed by such employer under special certificates issued under this subsection to exceed four, the Secretary may not issue such a special certificate for the employment of a student by such employer unless the Secretary finds employment of such student will not create a substantial probability of reducing the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection. If the issuance of a special certificate under paragraph (1) or (2) for an employer will not cause the number of students employed by such employer under special certificates issued under this subsection to exceed four—

"(i) the Secretary may issue a special certificate under paragraph (1) or (2) for the employment of a student by such employer if such employer certifies to the Secretary that the employment of such student will not reduce the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection, and

"(ii) in the case of an employer which is a retail or service establishment, subparagraph (B) of paragraph (1) shall not apply with respect to the issuance of special certificates for such employer under such paragraph.

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The requirement of this subparagraph shall not apply in the case of the issuance of special certificates under paragraph (3) for the employment of full-time students by institutions of higher education; except that if the Secretary determines that an institution of higher education is employing students under certificates issued under paragraph (3) but in violation of the requirements of that paragraph or of regulations issued thereunder, the requirements of this subparagraph shall apply with respect to the issuance of special certificates under paragraph (3) for the employment of students by such institution.

"(C) No special certificate may be issued under this subsection unless the employer for whom the certificate is to be issued provides evidence satisfactory to the Secretary of the student status of the employees to be employed under such special certificate."

(b) Section 14 is further amended by redesignating subsection (d) as subsection (c) and by adding at the end the following new subsection:

Ante, p. 69.

"(d) The Secretary may by regulation or order provide that sections 6 and 7 shall not apply with respect to the employment by any elementary or secondary school of its students if such employment constitutes, as determined under regulations prescribed by the Secretary, an integral part of the regular education program provided by such school and such employment is in accordance with applicable child labor laws."

Ante, pp. 60, 68.

(c) Section 4(d) is amended by adding at the end thereof the following new sentence: "Such report shall also include a summary of the special certificates issued under section 14(b)."

52 Stat. 1062; 69 Stat. 711. 29 USC 204.

Ante, p. 69.

CHILD LABOR

SEC. 25. (a) Section 12 (relating to child labor) is amended by adding at the end thereof the following new subsection:

52 Stat. 1067; 63 Stat. 917. 29 USC 212.

"(d) In order to carry out the objectives of this section, the Secretary may by regulation require employers to obtain from any employee proof of age."

(b) Section 13(c)(1) (relating to child labor in agriculture) is amended to read as follows:

80 Stat. 834. 29 USC 213.

"(c)(1) Except as provided in paragraph (2), the provisions of section 12 relating to child labor shall not apply to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee—

Supra.

"(A) is less than twelve years of age and (i) is employed by his parent, or by a person standing in the place of his parent, on a farm owned or operated by such parent or person, or (ii) is employed, with the consent of his parent or person standing in the place of his parent, on a farm, none of the employees of which are (because of section 13(a)(6)(A)) required to be paid at the wage rate prescribed by section 6(a)(5),

80 Stat. 833. Ante, p. 56.

"(B) is twelve years or thirteen years of age and (i) such employment is with the consent of his parent or person standing in the place of his parent, or (ii) his parent or such person is employed on the same farm as such employee, or

"(C) is fourteen years of age or older.".

(c) Section 16 is amended by adding at the end thereof the following new subsection:

52 Stat. 1069; 71 Stat. 514. 29 USC 216.

"(e) Any person who violates the provisions of section 12, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness

Penalty.

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of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty, when finally determined, may be—

"(1) deducted from any sums owing by the United States to the person charged;

"(2) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

"(3) ordered by the court, in an action brought for a violation of section 15(a)(4), to be paid to the Secretary.

52 Stat. 1068. 29 USC 215.

Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5, United States Code, and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 2 of an Act entitled 'An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes' (29 U.S.C. 9a)."

80 Stat. 384.

48 Stat. 582; 53 Stat. 581.

SUITS BY SECRETARY FOR BACK WAGES

63 Stat. 919; 80 Stat. 844. 29 USC 216.

SEC. 26. The first three sentences of section 16(c) are amended to read as follows: "The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) to bring an action by or on behalf of any employee and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 6 and 7 or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary."

Ante, pp. 55, 68.

ECONOMIC EFFECTS STUDIES

Ante, p. 72.

SEC. 27. Section 4(d) is amended by—

(1) inserting "(1)" immediately after "(d)",

(2) inserting in the second sentence after "minimum wages" the following: "and overtime coverage"; and

(3) by adding at the end thereof the following new paragraphs:

"(2) The Secretary shall conduct studies on the justification or lack thereof for each of the special exemptions set forth in section 13 of this Act, and the extent to which such exemptions apply to employees of establishments described in subsection (g) of such section and the economic effects of the application of such exemptions to such

Ante, p. 72.

Ante, p. 66.

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employees. The Secretary shall submit a report of his findings and recommendations to the Congress with respect to the studies conducted under this paragraph not later than January 1, 1976.

Report to Congress.

"(3) The Secretary shall conduct a continuing study on means to prevent curtailment of employment opportunities for manpower groups which have had historically high incidences of unemployment (such as disadvantaged minorities, youth, elderly, and such other groups as the Secretary may designate). The first report of the results of such study shall be transmitted to the Congress not later than one year after the effective date of the Fair Labor Standards Amendments of 1974. Subsequent reports on such study shall be transmitted to the Congress at two-year intervals after such effective date. Each such report shall include suggestions respecting the Secretary's authority under section 14 of this Act.".

Reports to Congress.

Ante, p. 69.

AGE DISCRIMINATION

SEC. 28. (a)(1) The first sentence of section 11(b) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 630(b)) is amended by striking out "twenty-five" and inserting in lieu thereof "twenty".

81 Stat. 605.

(2) The second sentence of section 11(b) of such Act is amended to read as follows: "The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.".

(3) Section 11(c) of such Act is amended by striking out ", or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance".

(4) Section 11(f) of such Act is amended to read as follows:

"(f) The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.".

"Employee."

(5) Section 16 of such Act is amended by striking out "$3,000,000" and inserting in lieu thereof "$5,000,000".

29 USC 634.

(b)(1) The Age Discrimination in Employment Act of 1967 is amended by redesignating sections 15 and 16, and all references thereto, as sections 16 and 17, respectively.

(2) The Age Discrimination in Employment Act of 1967 is further amended by adding immediately after section 14 the following new section:

29 USC 633.

"NONDISCRIMINATION ON ACCOUNT OF AGE IN FEDERAL GOVERNMENT EMPLOYMENT

"SEC. 15. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in

29 USC 633a.

88 STAT. 75

80 Stat. 378.

section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

Enforcement.

"(b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

Reports.

"(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a);

"(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

"(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

Civil actions.

"(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

"(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

"(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law."

88 STAT. 76

EFFECTIVE DATE

SEC. 29. (a) Except as otherwise specifically provided, the amendments made by this Act shall take effect on May 1, 1974.

(b) Notwithstanding subsection (a), on and after the date of the enactment of this Act the Secretary of Labor is authorized to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act.

Approved April 8, 1974.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 93-913 accompanying H.R. 12435 (Comm. on Education and Labor) and No. 93-953 (Comm. of Conference).

SENATE REPORT No. 93-690 (Comm. on Labor and Public Welfare).

CONGRESSIONAL RECORD, Vol 120 (1974):

Feb. 28, Mar. 5, 7, considered and passed Senate.

Mar. 20, considered and passed House, amended, in lieu of H.R. 12435.

Mar. 28, Senate and House agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 10, No. 15:

Apr. 8, Presidential statement.

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APPENDIX C

POLICE AND FIREFIGHTER REGULATIONS

41112

Title 29—Labor

CHAPTER V—WAGE AND HOUR DIVISION

PART 553—EMPLOYEES OF PUBLIC AGENCIES ENGAGED IN FIRE PROTECTION OR LAW ENFORCEMENT ACTIVITIES (INCLUDING SECURITY PERSONNEL IN CORRECTIONAL INSTITUTIONS)

The Fair Labor Standards Act of 1938 (52 Stat. 1060, as amended, 29 U.S.C. 201 et seq.), as amended by the Fair Labor Standards Amendments of 1974 (Pub. L. 93-259, 88 Stat. 55), extends the Act's minimum wage, overtime, equal pay and recordkeeping requirements to most public agency employees. In the case of certain public agencies (i.e., those having employees engaged in fire protection and law enforcement activities, including security personnel in correctional institutions), application of the Act's overtime provisions was delayed until January 1, 1975. This delay was accomplished by new section 13(b)(20) which provided an interim overtime exemption for all such employees regardless of the size of the employing public agency. Effective January 1, 1975, however, the section 13(b)(20) exemption will, by its express terms, be limited to fire protection and law enforcement employees who are employed by a public agency which has, during the workweek, less than five employees so engaged. For larger public agencies having such employees, the Act provides, in section 7(k), a partial overtime exemption which, by its express terms, becomes effective January 1, 1975. These two sections are self-executing and do not depend upon administrative rules or regulations.

On May 17, 1974, however, the Acting Administrator of the Wage and Hour Division, United States Department of Labor, recognizing the need for the issuance of guidelines for interpreting the new and unique overtime exemptions relating to these public agency employees, published in the FEDERAL REGISTER (39 FR 17596) notice of a hearing scheduled for June 3, 1974, to obtain evidence and receive comments regarding the duties, customs, practices, and working conditions of such employees.

The public hearing, which was held as scheduled on June 3, 1974, lasted two full days, during which time 11 individuals and organizations testified and 143 related exhibits were made a part of the hearing record.

Thereafter, on October 30, 1974, the Administrator of the Wage and Hour Division, after reviewing the hearing record in light of the express language and legislative history of the sections 7(k) and 13(b)(20) exemptions, issued proposed regulations (29 CFR Part 553), defining "employees engaged in fire protection and law enforcement activities" and prescribing tentative guidelines for determining hours worked, the work period and tour of duty, and caused the proposed regulations to be published in the FEDERAL REGISTER (39 FR 38663).

The proposed regulations as thus published invited interested persons to submit written comments, suggestions, data or arguments in regard to them on or before December 2, 1974, and, in addition, scheduled a further public hearing for November 18, 1974. In order to give as wide publicity as possible to all affected public agencies, copies of the proposed regulations were mailed directly to the governors of all 50 States, with informational copies going to every State Attorney General and State Fire Marshal, each of whom was requested to bring the proposed regulations to the attention of interested State and local government officials. In addition, approximately 800 copies of the proposed regulations were mailed to individuals, labor organizations, employer organizations, State and local government officials and agencies, as well as to members of the United States Congress.

The further public hearing, announced in the FEDERAL REGISTER on November 1, 1974, was held in Washington, D.C., on November 18-21, 1974, for the purpose of receiving oral suggestions, proposals and comments on the proposed Part 553 from interested persons. Thirty-eight individuals and organizations testified at this second hearing and approximately 300 related exhibits were made a part of the hearing record, which, along with the June 1974 hearing record, is on file with the Chief, Branch of Wage-Hour Standards, Wage and Hour Division, United States Department of Labor, Room 1107, 711 14th Street, NW., Washington, D.C. 20210.

A thorough analysis of all testimony and written material received in connection with the November 1974 hearing has been made, again in conjunction with the express statutory language and pertinent legislative history. This analysis indicated the desirability of making certain changes and additions in 29 CFR Part 553, as proposed, as well as adding new sections to it for the purpose of calling attention to the existence of other Fair Labor Standards Act exemptions which might be available to public agencies affected by new Part 553, as well as to the Act's recordkeeping requirements which are applicable to all covered employers. Other changes in proposed Part 553 expand the term "any employee in fire protection activities" to include employees of forestry conservation agencies who spot forest or brush fires and help in their extinguishment along with other individuals who are called upon to assist during periods of emergencies and high fire danger. Similarly, the term "any employee in law enforcement activities" has been expanded to include "border patrol agents," and modified to indicate that fish and game wardens and criminal investigative agents assigned to such offices as those of a district attorney may be engaged in such activities, depending upon the particular facts. Both of the foregoing terms have been further expanded to indicate that bona fide fire protection and law enforcement employees will not lose their exempt status when they perform "support activities" on a rotational assignment for training or familiarization purposes, or for other reasons due to illness, injury or infirmity; the requirement that law enforcement officers be sworn has been deleted, as has the requirement for completed training. The sections dealing with training (§ 553.7), secondary and joint employment (§ 553.9), volunteers (§ 553.11) and "comp time" (formerly § 553.17 and now § 553.19) have been further clarified, and a new section has been added to explain the general rules for determining compensable hours of work. Numerous other minor changes have been made but they are not discussed in this preamble since they can be readily discerned by comparing the proposed Part 553 with the version now to be issued. It was suggested that changes be made in the current definitions of executive, administrative or professional employees, and these suggestions, although not germane to the section 7(k) or 13(b)(20) exemptions, will be considered when 29 CFR Part 541 is reissued. The arguments criticizing the subsections dealing with mutual aid agreements (§ 553.10) and sleep and meal time (§ 553.15) were carefully considered. No substantive changes were made, however, because these subsections restate legal requirements which cannot be waived or altered by any official of the Department of Labor. Numerous other arguments were directed to the inflationary or cost impact of Part 553. Whatever impact there is, however, is the result of the 1974 Amendments, which, after Congress had considered these same arguments, expressly extended overtime protection to employees engaged in fire protection and law enforcement activities. Moreover, the extent to which the Act will have a cost impact on such public agencies depends, in large part, upon which of the several alternatives open to them the State and local jurisdictions elect to use. Assuming that all jurisdictions elect section 7(k), without any modification in the present tours of duty, the estimated cost impact of the extension of the Act's overtime requirement for calendar year 1975 is estimated to be $27 million for all such jurisdictions.

In issuing Part 553, it is recognized that the Secretary of Labor has been directed by the 1974 Amendments to conduct a study in calendar year 1976 of the hours ordinarily worked by fire protection and law enforcement employees, and to publish the results thereof in the FEDERAL REGISTER (88 Stat. 61). Now, therefore, pending completion of such study or studies, the final version of Part 553 is hereby adopted on an interim basis to read as follows:

Sec.
553.1 Statutory provisions.
553.2 Purpose and scope.

EMPLOYEES ENGAGED IN FIRE PROTECTION AND LAW ENFORCEMENT ACTIVITIES (INCLUDING SECURITY PERSONNEL IN CORRECTIONAL INSTITUTIONS)

Sec.
553.3 Fire protection activities.
553.4 Law enforcement activities.
553.5 20-percent limitation on nonexempt work.
553.6 Public agency employees engaged in both fire protection and law enforcement activities.

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Sec.
553.7 Employees attending training facilities.
553.8 Ambulance and rescue service employees.
553.9 Fire protection or law enforcement employees who perform unrelated work for their own agency or for another public agency or private employer.
553.10 Mutual aid.
553.11 Fire protection and law enforcement volunteers.

RULES FOR DETERMINING THE TOUR OF DUTY, WORK PERIOD AND COMPENSABLE HOURS OF WORK

553.12 General statement.
553.13 Tour of duty.
553.14 General rules for determining compensable hours of work.
553.15 Sleeping and meal time as compensable hours of work.
553.16 Work period.
553.17 Early relief.
553.18 Trading time.
553.19 Time off for excess hours or so-called "comp time."
553.20 The "regular rate."
553.21 Records to be kept.

AUTHORITY: Secs. 1-19, 52 Stat. 1060, as amended; 88 Stat. 60; (29 U.S.C. 201-219).

§ 553.1 Statutory provisions.

(a) In extending coverage to certain public agency employees, the Fair Labor Standards Act (hereafter the Act), by virtue of section 13(b)(20), provided a complete overtime exemption for any employee of a public agency who is engaged in fire protection or law enforcement activities (including security personnel in correctional institutions) during the period between the effective date of the 1974 Amendments (May 1, 1974) to and through December 31, 1974. Beginning January 1, 1975, however, this complete overtime exemption may be claimed only with respect to "any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than five employees in fire protection or law enforcement activities, as the case may be."

(b) Beginning January 1, 1975, public agencies not qualifying for the complete overtime exemption provided in section 13(b)(20) will be required to pay overtime compensation to their fire protection and law enforcement employees on a workweek basis as required by section 7(a) of the Act unless they elect to take advantage of the partial overtime exemption provided in section 7(k) which applies, not on a workweek basis, but on a work period basis, as follows:

*** * * No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—**

(1) In a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed 240 hours; or

(2) In the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 240 hours bears to 28 days, compensation at a rate of not less than one and one-half times the regular rate at which he is employed.

(B) Effective January 1, 1976, section 7(k) is amended by striking out "240 hours" each place it occurs and inserting in lieu thereof "232 hours".

(C) Effective January 1, 1977, such section is amended by striking out "232 hours" each place it occurs and inserting in lieu thereof "216 hours".

(D) Effective January 1, 1978, such section is amended—

(i) By striking out "exceed 216 hours" in paragraph (1) and inserting in lieu thereof "exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975"; and

(ii) By striking out "as 216 hours bears to 28 days" in paragraph (2) and inserting in lieu thereof "as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days * * *.

(c) These statutory provisions, as is apparent from their terms, are limited to public agencies and do not apply to any private organization engaged in furnishing fire protection or law enforcement services, and this is so even if the services are provided under contract with a public agency.

(d) In determining whether a public agency qualifies for the section 13(b)(20) exemption after January 1, 1975, the fire protection and law enforcement activities are considered separately. Thus, for example, if a public agency employs less than five employees in fire protection activities but five or more employees in law enforcement activities (including security personnel in a correctional institution), it may claim the exemption for the fire protection employees but not for the law enforcement employees. No distinction is made between full-time and part-time employees, and both must be counted in determining whether the exemption applies. Bona fide volunteers may be excluded. This determination of the number of employees engaged in each of the two named activities is made on a workweek basis.

(e) In addition to the special exemptions provided in sections 7(k) and 13(b)(20), which are the subject matter of Parts 553, the Act provides other exemptions which, depending upon the facts, may be claimed for certain employees in lieu of such special exemptions. For example, section 13(a)(1) provides a complete exemption for any employee employed in a bona fide executive, administrative or professional capacity, as those terms are defined and delimited in 29 CFR Part 541, and that exemption may be claimed for any fire protection or law enforcement employee who meets all of the tests specified in Part 541 relating to duties, responsibilities and salary. Thus, although police captains are clearly employees engaged in law enforcement activities, they may also, depending upon the facts, qualify for the section 13(a)(1) exemption, in which event the employing agency may claim that exemption for such employees in lieu of the section 7(k) or 13(b)(20) exemption. Similarly, certain criminal investigative agents may qualify as administrative employees, in which event the employing agency may elect which of the applicable exemptions it will claim for such employees. In no event, however will the election to take the section 13(a)(1) exemption for an employee who qualifies for it result in excluding that employee from the count that must be made under § 553.1(d) in determining whether the employer may claim for its other employees the section 13(b)(20) exemption.

§ 553.2 Purpose and scope.

The purpose of Part 553 is to define the pertinent statutory terms used in sections 7(k) and 13(b)(20) and to set forth the rules by which the Administrator of the Wage and Hour Division will determine the compensable hours of work, tour of duty and work period in applying the section 7(k) exemption.

EMPLOYEES ENGAGED IN FIRE PROTECTION AND LAW ENFORCEMENT ACTIVITIES (INCLUDING SECURITY PERSONNEL IN CORRECTIONAL INSTITUTIONS)

§ 553.3 Fire protection activities.

(a) As used in section 7(k) and 13(b)(20) of the Act, the term "any employee in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district and who, pursuant to the extent required by State statute or local ordinance, has been trained and has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type and (2) who performs activities which are required for, and directly concerned with the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. The term would include all such employees, regardless of their status as "trainee," "probationary," or "permanent" employee, or of their particular speciality or job title (e.g., firefighter, engineer, hose or ladder operator, fire specialist, fire inspector, lieutenant, captain, inspector, fire marshal, battalion chief, deputy chief, or chief), and regardless of their assignment to support activities of the type described in paragraph (d) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See § 553.7.

(b) The term "any employee in fire protection activities" also refers to employees who work for forest conservation agencies or other public agencies charged with forest fire fighting responsibilities, and who direct or engage in (1) fire spotting or lookout activities, or (2) fighting fires on the fireline or from aircraft or (3) operating tank trucks, bulldozers and tractors for the purpose of clearing fire

breaks. The term includes all persons so engaged, regardless of their status as full time or part time agency employees or as temporary or casual workers employed for a particular fire or for periods of high fire danger, including those who have had no prior training. It does not include such agency employees as biologists and office personnel who do not fight fires on a regular basis, except, of course, during those emergency situations when they are called upon to spend substantially all (i.e., 80 percent or more) of their time during the applicable work period in one or more of the activities described in paragraph (b) (1), (2) and (3) of this section. Additionally, for those persons who actually engage in these fire protection activities, the simultaneous performance of such related functions as housekeeping, equipment maintenance, tower repairs and/or the construction of fire roads, would also be within the section 7(k) or 13(b)(20) exemption.

(c) Not included in the term "employee in fire protection activities" are the so-called "civilian" employees of a fire department, fire district, or forestry service who engage in such support activities as those performed by dispatchers, alarm operators, apparatus and equipment repair and maintenance workers, camp cooks, clerks, stenographers, etc.

§ 553.1 Law enforcement activities.

(a) As used in sections 7(k) and 13(b)(20) of the Act, the term "any employee in law enforcement activities" refers to any employee (1) who is a uniformed or plainclothed member of a body of officers and subordinates who are empowered by statute or local ordinance to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes, (2) who has the power of arrest, and (3) who is presently undergoing or has undergone or will undergo on-the-job training and or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics.

Employees who meet these tests are considered to be engaged in law enforcement activities regardless of their rank, or of their status as "trainee," "probationary" or "permanent" employee, and regardless of their assignment to duties incidental to the performance of their law enforcement activities such as equipment maintenance, and lecturing, or to support activities of the type described in paragraph (f) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's law enforcement activities. See § 553.8.

(b) Typically, employees engaged in law enforcement activities include city police; district or local police; sheriffs, under sheriffs or deputy sheriffs who are regularly employed and paid as such; court marshals or deputy marshals; constables and deputy constables who are regularly employed and paid as such; border control agents; state troopers and highway patrol officers. Other agency employees not specifically mentioned may, depending upon the particular facts and pertinent statutory provisions in that jurisdiction, meet the three tests described above. If so, they will also qualify as law enforcement officers. Such employees might include, for example, fish and game wardens or criminal investigative agents assigned to the office of a district attorney, an attorney general, a solicitor general or any other law enforcement agency concerned with keeping public peace and order and protecting life and property.

(c) Some of the law enforcement officers listed above, including but not limited to certain sheriffs, will not be covered by the Act if they are elected officials and if they are not subject to the civil service laws of their particular State or local jurisdition. Section 3(e)(2)(C) of the Act excludes from its definition of "employee" elected officials and their personal staff under the conditions therein prescribed. 29 U.S.C. 203(e)(2)(C). Such individuals, therefore, need not be counted in determining whether the public agency in question has less than five employees engaged in law enforcement activities for purposes of claiming the section 13(b)(20) exemption.

(d) Employees who do not meet each of the three tests described above are not engaged in "law enforcement activities," as that term is used in sections 7(k) and 13(b)(20). Such employees would typically include (1) building inspectors (other than those defined in § 553.3(a)), (2) health inspectors, (3) animal control personnel, (4) sanitarians, (5) civilian traffic employes who direct vehicular and pedestrian traffic at specified intersections or other control points, (6) civilian parking checkers who patrol assigned areas for the purpose of discovering parking violations and issuing appropriate warnings or appearance notices, (7) wage and hour compliance officers, (8) equal employment opportunity compliance officers, (9) tax compliance officers, (10) coal mining inspectors, and (11) building guards whose primary duty is to protect the lives and property of persons within the limited area of the building.

(e) The term "any employee in law enforcement activities" also includes, by express reference, "security personnel in correctional institutions." A correctional institution is any government facility maintained as part of a penal system for the incarceration or detention of persons suspected or convicted of having breached the peace or committed some other crime. Typically, such facilities include penitentiaries, prisons, prison farms, county, city and village jails, precinct house lockups and reformatories. Employees of correctional institutions who qualify as security personnel for purposes of the section 7(k) exemption are those who have responsibility for controlling and maintaining custody of inmates and of safeguarding them from other inmates or for supervising such functions, regardless of whether their duties are performed inside the correctional institution or outside the institution (as in the case of road gangs). These employees are considered to be engaged in law enforcement activities regardless of their rank (e.g., warden, assistant warden or guard) or of their status as "trainee," "probationary," or "permanent" employee, and regardless of their assignment to duties incidental to the performance of their law enforcement activities, or to support activities of the type described in paragraph (f) of this section, whether or not such assignment is for training or familiarization purposes or for reasons of illness, injury or infirmity.

(f) Not included in the term "employee in law enforcement activities" are the so-called "civilian" employees of law enforcement agencies or correctional institutions who engage in such support activities as those performed by dispatcher, radio operators, apparatus and equipment maintenance and repair workers, janitors, clerks and stenographers. Nor does the term include employees in correctional institutions who engage in building repair and maintenance, culinary services, teaching, or in psychological, medical and paramedical services. This is so even though such employees may, when assigned to correctional institutions, come into regular contact with the inmates in the performance of their duties.

§ 553.5 20-percent limitation on nonexempt work.

Employees engaged in fire protection or law enforcement activities, as described in §§ 553.3 and 553.4, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their firefighting activities. For example, those who work for forest conservation agencies may, during slack periods, plant trees and perform other conservation activities. The performance of such nonexempt work will not defeat either the section 7(k) or 13(b)(20) exemption unless it exceeds 20 percent of the total hours worked by the particular employee during the applicable work period.

§ 553.6 Public agency employees engaged in both fire protection and law enforcement activities.

Some public agencies have employees (sometimes referred to as public safety officers) who engage in both law enforcement activities and fire protection activities, depending upon the agency needs at the time. This dual assignment would not defeat either the section 7(k) or 13(b)(20) exemption, provided that each of the activities performed meets the appropriate tests set forth in §§ 553.3(a), 553.4(a) and (e). This is so regardless of how the employees divide their time between the two types of activities. If, however, either the fire protection or law enforcement activities do not meet the tests of § 553.3(a) or §§ 553.4(a) and (e), and if such nonqualifying activities, standing alone or in conjunction with

some other nonexempt activity, exceed 20 percent of the employee's total hours of work in the work period, neither exemption would apply.

§ 553.7 Employees attending training facilities.

The attendance at a bona fide fire or police academy or other training facility, when required by the employing public agency, does not constitute engagement in exempt activities, unless the employee in question meets all the tests described in § 553.3(a) or § 553.4(a), as the case may be, in which event such training or further training would be incidental to, and thus part of, the employee's fire protection or law enforcement activities. Only the time spent in actual training or retraining constitutes compensable hours of work. All other time, such as that spent in studying and other personal pursuits, is not compensable hours of work even in situations where the employee is confined to campus or to barracks 24 hours a day. See § 553.14. Attendance at training facilities and schools, which is not required but which may incidentally improve the employee's performance of his or her regular tasks or prepare the employee for further advancement, need not be counted as working time even though the public agency may pay for all or part of such training.

§ 553.8 Ambulance and rescue service employees.

(a) Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by sections 7(k) and 13(b)(20) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received special training in the rescue of fire and accident victims or firefighters injured in the performance of their firefighting duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, riots, natural disasters and accidents.

(b) Ambulance and rescue service employees of public agencies subject to the Act prior to the 1974 Amendments do not come within the section 7(k) or section 13(b)(20) exemptions, since it was not the purpose of those Amendments to deny the Act's protection of previously covered employees. This would include employees of public agencies engaged in the operation of a hospital; an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institutions; a school for mentally or physically handicapped or gifted children; an elementary or secondary school; an institution of higher education; a street, suburban, or interurban electric railway; or local trolley or motor bus carrier.

(c) Ambulance and rescue service employees of private organizations do not come within the section 7(k) or section 13(b)(20) exemptions even if their activities are substantially related to the fire protection and law enforcement activities performed by a public agency.

§ 553.9 Fire protection or law enforcement employees who perform unrelated work for their own agency or for another public agency or private employer.

(a) If an employee regularly engaged in exempt fire protection or law enforcement activities also works for another department or agency of the same State or political subdivision, such employee will lose the exemption if the other work is unrelated to fire protection or law enforcement activities. For example, if a city police officer also works as a clerk in the city health department, which is clearly nonexempt work, the city could not claim the section 7(k) exemption for such employee and would have to pay overtime compensation for all hours worked for the two agencies in excess of 40 per week. See 29 CFR 778.117 for an explanation of how overtime compensation is computed in such a situation. If, however, such employee's other job for the city is also exempt work, as, for example lifeguarding at a seasonally operated city beach which work is exempt from both the Act's minimum wage and overtime provisions by virtue of section 13(a)(3), the city would be entitled to claim the lesser of the two exemptions which, in the example given would be the section 7(k) exemption, and it would have to pay overtime compensation only for the combined hours (if any) which are in excess of the employee's tour of duty.

(b) These same principles also apply where the fire protection or law enforcement employee works for another public or private employer who, although entirely separate from the employee's regular employer, is nonetheless a joint employer with the fire protection or law enforcement agency. Usually, of course, working for a separate employer does not affect the employee's status as an employee engaged in fire protection or law enforcement activities or the employing agency's right to claim the section 7(k) or 13(b)(20) exemption. In some limited circumstances, however, the relationship between the fire protection or law enforcement agency and the other employer is so closely related that they must be treated as joint employers. Such a joint employment relationship exists where the work done by the employee simultaneously benefits both employers and where it is done pursuant to an arrangement between the employers to share or interchange employees, or where one employer acts directly or indirectly in the interest of the other employer in relation to the same employee, or where the employers are so closely associated that they share control of the employee, directly or indirectly. See 29 CFR Part 791.

(c) To illustrate, if a police officer independently finds after-hours employment as a repair mechanic in a gas station or as a security guard in a department store, there would be no joint employment relationship between the police department and the second employer. This would be so even if the police officer wore his or her uniform at the second job and even if the police department engaged in such "brokering" functions as maintaining a list of officers available for extra outside work and referring employment requests to such officers. Nor would it matter whether the police department also established a wage scale for such extra outside work and approved it so as to avoid any conflict of interest problem. On the other hand, if the second employer is required by local ordinance or otherwise to hire a police officer to control crowds at a stadium or to direct traffic at a sports arena or during a parade, such employment benefits both the police department and the second employer, and, since both act in the interest of the other, a joint employment relationship is created.

§ 553.10 Mutual aid.

If employees engaged in fire protection activities voluntarily respond to a call for aid from a neighboring jurisdiction, they are volunteers in rendering such aid and their employer is not required to compensate them for the time spent in the neighboring jurisdiction. See § 553.10. If, however, the employees respond to such a call because their employer has a mutual aid agreement with a neighboring jurisdiction or if the employees are directed by their agency to respond, all hours worked by these employees in rendering such aid must be added to their regular hours of work for purposes of the section 7(k) exemption.

§ 553.11 Fire protection and law enforcement volunteers.

(a) Individuals who volunteer to perform fire protection or law enforcement activities, usually on a part-time basis and as a public service, are not considered to be employees of the public agency which receives their services. Such individuals do not lose their volunteer status because their tuition may have been paid or they may have been reimbursed for attending special classes or other training to learn about fire protection or law enforcement or because they are reimbursed for approximate out-of-pocket expenses incurred incidental to answering a call or to the cost of replacing clothing or other items of equipment which may have been consumed or damaged in responding to a call. Nor is the volunteer status of such individuals lost where the only material recognition afforded them is the holding of an annual party, the furnishing of a uniform and related equipment, or their inclusion in a retirement or relief fund, a workman's compensation plan or a life or health insurance program, or the payment of a nominal sum on a per call or other basis which may either be retained, in whole or in part, by the volunteer or donated to finance various social activities conducted by or under the auspices of the agency. Payments which average $2.50 per call will be considered nominal. Payments in excess of this amount may also qualify as nominal, depending upon the distances which must be traveled and other expenses incurred by the volunteer. For purposes of this paragraph, it is not necessary for the

agency to maintain an exact record of expenses.

(b) Where, however, individuals engaged in fire protection or law enforcement activities receive more than a nominal amount or payment on a basis which does not reasonably approximate the expenses incurred by them, they are employees rather than volunteers and must be paid in accordance with the Act's requirements.

(c) Volunteers engaged in fire protection or law enforcement activities may include individuals who are employed in some other capacity by the same public agency. For example, a civilian PBX operator of a public agency engaged in law enforcement activities may also be a volunteer member of the local police reserve force. Similarly, an employee of a village Department of Parks and Recreation may serve as a volunteer firefighter in his or her local community.

(d) Police officers or firefighters of one jurisdiction may engage in fire protection or law enforcement activities on a voluntary basis for another jurisdiction where there is no mutual aid agreement or other relationship between the two jurisdictions. Such employees cannot, however, perform fire protection or law enforcement activities on a voluntary basis for their own agency, although they can engage in other activities not directly related to these primary functions. For example, a paramedic employed by a city fire department could volunteer to give a course in first aid at the city hospital and a police officer could volunteer to counsel young juveniles who are members of a boy's club or other similar organizations.

RULES FOR DETERMINING THE TOUR OF DUTY, WORK PERIOD AND COMPENSABLE HOURS OF WORK

§ 553.12 General statement.

(a) In extending the Act's coverage to public agency employees engaged in fire protection and law enforcement activities, Congress, recognizing the uniqueness of these activities, established section 7(k) which permits the computation of hours worked on the basis of a work period (which can be longer than a workweek) and which bases the overtime requirements on a work period concept. In adding this provision, Congress made it clear that some adjustment would have to be made in the usual rules for determining compensable hours of work (Conf. Rept. 93-953, p. 27) and where the employer elects section 7(k), these rules must be used for purpose of both the Act's minimum wage and overtime requirements.

(b) If, however, any public agency chooses not to claim the partial overtime exemption provided in section 7(k), but elects to pay overtime compensation as required by section 7(a), it need not concern itself with the "tour of duty" or "work period" discussion which follows or with the special rules relating to the determination of what constitutes compensable hours of work since, in that event, overtime would be payable on a workweek basis and the regular method of computing "hours worked" as set forth in 29 CFR Part 785 would apply. Such an agency would not, however, be able to take advantage of the special provisions of Part 553 relating to the balancing of hours over an entire work period, trading time and early relief.

§ 553.13 Tour of duty.

The term "tour of duty," as used in section 7(k), means the period during which an employee is on duty. It may be a scheduled or unscheduled period. Scheduled periods refer to shifts, i.e., the period of time which elapses between scheduled arrival and departure times, or to scheduled periods outside the shift, as in the case of a special detail involving crowd control during a parade or other such event. Unscheduled periods refer to time spent in court by police officers, time spent handling emergency situations, or time spent after a shift in order to complete required work. When an employee actually works fewer hours than those scheduled, the employee's tour of duty is reduced accordingly. Nothing in section 7(k) precludes employers (acting pursuant to collective bargaining agreements or in accordance with their own authority) from establishing new tours of duty for their employees, provided, however, that the change is intended to be permanent at the time that it is made.

§ 553.14 General rules for determining compensable hours of work.

(a) Compensable hours of work generally include all of that time during which an employee is on duty or on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer. Such hours thus include all pre-shift and post-shift activities which are an integral part of the employee's principal activity or which are closely related and indispensable to its performance, such as attending roll call, writing up and completing reports or tickets, and washing and re-racking fire hose. It also includes time which an employee spends in attending required training classes. See § 553.7. Time spent away from the employer's premises under conditions so circumscribed that they restrict the employee from effectively using the time for personal pursuits, also constitutes compensable hours of work. For example, a police officer who is required to remain at home until summoned to testify in a pending court case and who must be in a constant state of instant readiness, is engaged in compensable hours of work. On the other hand, employees who are confined to barracks while attending police academies are not on duty during those times when they are not in class or at a training session since they are free to use such time for personal pursuits. This would also be true in a forest fire situation where employees, who have been relieved from duty and transported away from the fire line, are, for all practical purposes, required to remain at the fire camp because their homes are too far distant for commuting purposes. Also, a police officer who has completed his or her tour of duty but who is given a patrol car to drive home and use on private business, is not working simply because the radio must be left on so that the officer can respond to emergency calls. Of course, the time spent in responding to such calls would be compensable, except in those instances where it is miniscule and cannot, as an administrative matter, be recorded for payroll purposes.

(b) Additional examples of compensable and noncompensable hours of work are set forth in 29 CFR Part 785 which is fully applicable to employees for whom the section 7(k) exemption is claimed except to the extent that it has been modified below in § 553.15.

§ 553.15 Sleeping and meal time as compensable hours of work.

(a) Where the employer has elected to use the section 7(k) exemption, sleep and meal time cannot be excluded from compensable hours of work where (1) the employee is on duty for less than 24 hours, which is the general rule applicable to all employees (29 CFR 785.21) and (2) where the employee is on duty for exactly 24 hours, which represents a departure from 29 CFR 785.21.

(b) Sleep and meal time may, however, be excluded in the case of fire protection or law enforcement employees who are on duty for more than 24 hours, but only if there is an express or implied agreement between the employer and the employee to exclude such time. In the absence of any such agreement, sleep and meal time will constitute hours of work. If, on the other hand, the agreement provides for the exclusion of sleep time the amount of such time shall, in no event, exceed 8 hours, in a 24-hour period, which is also the amount of time permitted when the agreement fails to specify the duration of sleep time. If such sleep time is interrupted by a call to duty, the interruption must be counted as hours worked, and if the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep (which, for enforcement purposes, means at least 5 hours), the entire time must be counted as hours of work.

§ 553.16 Work period.

(a) As used in section 7(k), the term "work period" refers to any established and regularly recurring period of work which, under the terms of the Act and legislative history, cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation, the work period can be of any length, and it need not coincide with the pay period or with a particular day of the week or hour of the day. Once the beginning time of an employee's work period is established, however, it remains fixed regardless of how many hours are worked within that period. The beginning of the work period, may, of course, be changed, provided that the change is intended to be permanent at the time that it is made.

(b) An employer may have one work period applicable to all of its employees, or different work periods for different employees or groups of employees. Prior

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approval from the Wage and Hour Division is not required. The employer must, however, make some notation in its records which shows the work period for each employee and which indicates the length of that period and its starting time.

(c) For those employees who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required until the ratio between the number of days in the work period and the hours worked during such work period exceeds the ratio between a work period of 28 days and 240 hours, at which point all additional hours are paid for at one and one-half times the employee's regular rate of pay.

(d) The ratio of 240 hours to 28 days is 8.57143 hours per day (8.57 rounded). Accordingly, overtime compensation at a rate of not less than one and one-half times the employee's regular rate of pay must be paid during calendar year 1975 for all hours worked in excess of the following maximum hours standards:

Work period (days):	*Maximum hours standard*
28	240
27	231
26	223
25	214
24	206
23	197
22	189
21	180
20	171
19	163
18	154
17	146
16	137
15	129
14	120
13	111
12	103
11	94
10	86
9	77
8	69
7	60

§ 553.17 Early relief.

It is a common practice among employees engaged in fire protection activities to relieve employees on the previous shift or tour of duty prior to the scheduled starting time. Such early relief may occur pursuant to employee agreement, either expressed or implied. This practice will not have the effect of increasing the number of compensable hours of work where it is voluntary on the part of the employees and does not result, over a period of time, in their failure to receive proper compensation for all hours actually worked. On the other hand, if the practice is required by the employer the time involved must be added to the employee's tour of duty and treated as compensable time.

§ 553.18 Trading time.

Another common practice or agreement among employees engaged in fire protection or law enforcement activities is that of substituting for one another on regularly scheduled tours of duty (or for some part thereof) in order to permit an employee to absent himself or herself from work to attend to purely personal pursuits. This practice is commonly referred to as "trading time." Although the usual rules for determining hours of work would require that the additional hours worked by the substituting employee be counted in computing his or her total hours of work, the legislative history makes it clear that Congress intended the continued use of "trading time" "both within the tour of duty cycle * * * and from one cycle to another within the calendar or fiscal year without the employer being subject to [additional overtime compensation] by virtue of the voluntary trading of time by employees" (Congressional Record, March 28, 1974, Page S 4692). Accordingly, the practice of "trading time" will be deemed to have no effect on hours of work if the following criteria are met: (a) The trading of time is done voluntarily by the employees participating in the program and not at the behest of the employer; (b) the reason for trading time is due, not to the employer's business operations, but to the employee's desire or need to attend to personal matter; (c) a record is maintained by the employer of all time traded by his employees; (d) the period during which time is traded and paid back does not exceed 12 months.

§ 553.19 Time off for excess hours or so-called "comp time."

(a) As a general rule, all overtime hours must be paid for in cash and not in time off. Section 7(k) creates a partial exception to this general rule by allowing employers to balance the employee's

hours over a work period, which, as indicated in § 553.16, may be longer than a workweek, and to pay the overtime compensation required by the Act only if the employee's hours exceed the total number of hours established by section 7(k) for that particular work period. Thus, for example, if the duration of the employee's work period is 28 consecutive days, and he or she works 80 hours in the first week, but only 60 in the second week and 50 in each of the next 2 weeks, no additional overtime compensation would be required, since the total number of hours worked does not exceed 240. Of course, there might be a State law requiring overtime compensation at some earlier point (e.g., for any hours worked in excess of 40 in a week), but that obligation could be met with "comp time," if comp time is permissible under State law and if the wages paid to the employee for all hours worked during the entire 28-day tour of duty equal at least the minimum wage set forth in section 6(b) of the Act (29 U.S.C. 206(b)). Similarly, an employee whose work period is 1 week could be paid in "comp time" for all excess hours up to 60, provided that comp time is a permissible form of payment under State law and provided, also, that the wages paid to the employee equal at least the statutory minimum wage. Such "comp time" could be taken at any time authorized by state law or local ordinance.

(b) If the employee in either of the examples given above works more than the stated number of hours for a 7-day or 28-day work period, overtime compensation must be paid at one and one-half times the employee's regular rate. In computing the employee's regular rate, the cash equivalent of any comp time must be included. See also § 553.20.

§ 553.20 The "regular rate".

The rules for computing an employee's "regular rate," for purposes of the Act's overtime requirements, are set forth in 29 CFR Part 778. These rules are fully applicable to employees for whom the section 7(k) exemption is claimed, except that wherever the word "workweek" is used the word "work period" should be substituted.

§ 553.21 Records to be kept.

The recordkeeping requirements of the Act are set forth in 29 CFR Part 516. These requirements are applicable to public agencies engaged in fire protection and law enforcement activities, except that where section 7(k) is claimed, the records for those employees can be kept on a work period, instead of a workweek, basis. In addition, the records must show, as indicated in § 553.16(b), the work period for each employee.

Signed at Washington, D.C. this 18th day of December 1974.

BETTY SOUTHARD MURPHY,
Administrator.

[FR Doc.74-29843 Filed 12-19-74;8:45 am]

APPENDIX D

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed 12-31-74
James F. Davey
Clerk

The NATIONAL LEAGUE OF CITIES, *et al.*	)	
Plaintiffs,	)	
	)	Civil
v.	)	Action
	)	No.
The Honorable PETER J. BRENNAN,	)	74-1812
Defendant.		

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the National League of Cities, the National Governors' Conference, the States of Arizona, Indiana, Iowa, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Washington, the Metropolitan Government of Nashville and Davidson County, Tennes-

see, and the Cities of Cape Girardeau, Missouri, Lompoc, California, and Salt Lake City, Utah, Plaintiffs, hereby appeal to the Supreme Court of the United States from the final Order dismissing the Complaint in this Action, entered on December 31, 1974.

This Appeal is taken pursuant to 28 U.S.C. §1253.

/s/ Charles S. Rhyne
Charles S. Rhyne
Rhyne and Rhyne
400 Hill Building
839 - 17th Street, N.W.
Washington, D.C. 20006
(202) 347-7992

Attorney for Appellants

Supreme Court, U. S.
FILED
MAR 6 1975
MICHAEL RODAK, JR., CLERK

APPENDIX
Volume I – pages 1-310

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-878
and 74-879

NATIONAL LEAGUE OF CITIES, *et al.* (in No. 74-878), and STATE OF CALIFORNIA (in No. 74-879),

Appellants,

v.

HON. PETER J. BRENNAN, SECRETARY OF LABOR OF THE UNITED STATES,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED JANUARY 17, 1975
PROBABLE JURISDICTION NOTED JANUARY 27, 1975

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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DOCKET ENTRIES IN 74-1812
NATIONAL LEAGUE OF CITIES, et al.,
v.
HON. PETER J. BRENNAN
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[1974]

Dec. 12, Complaint, appearance filed D.A. & A.G. ser 12-13.

Dec. 12, Summons, Copies (3) and Copies (3) of Complaint issued Deft ser: 12/13/74.

Dec. 12, APPLICATION of pltfs. for Preliminary Injunction; P & A's.

Dec. 12, APPLICATION of pltfs. for convening of Three-Judge Court.

Dec. 12, NOTICE of application of Three-Judge Court, Gasch, J.

Dec. 13, DESIGNATION of the Honorable Barrington D. Parker, United States District Judge and the Honorable Harold Leventhal, United States Circuit Judge, to serve with the Honorable Oliver Gasch, United States District Judge, as members of a three-judge court to hear and determine this action. (N) Bazelon, C.J., U.S.C.A.

Dec. 18, MOTION of deft. for order shortening the time for service of notice of deposition or in the alternative enlarging time to respond to motion for preliminary injunction and postponing hearing on motion for preliminary injunction; P & A's; c/s 12/18/74.

Dec. 18, NOTICE by deft. to take deposition of Allen E. Pritchard, Jr.; c/s 12/18/74.

Dec. 18, NOTICE by deft. to take deposition of Charles A. Byrley; c/s 12/18/74.

Dec. 19, STIPULATION extending time for deft. to

respond to motion of pltfs. for preliminary injunction until Dec. 26, 1974. (signed 12/18/74). (N) Gasch, J.

Dec. 19, ORDER shortening time of defts. for serving notice of taking deposition of depositions set for 12-23-74 & 12-24-74. (See order for details). (N) Gasch, J.

Dec. 26, REQUEST by deft's counsel to the Clerk of the Court to file transcripts of the depositions of Allen E. Pritchard, Jr. and Charles A. Byrley with exhibits; c/m 12-26-74. (app. of Nathan Dodell, Ass't U.S. Atty.)

Dec. 26, DEPOSITION of Allen Pritchard, Jr.

Dec. 26, DEPOSITION of Charles A. Byrley.

Dec. 26, EXHIBITS 1-49 to deft's deposition; exhibit #1 to pltf's deposition; and joint deposition exhibits 4(a), (b), (c) and 6(a), (b), (c).

Dec. 26, MOTION of State of California, Evelle J. Younger, Ronald Reagan, Verne Orr, James G. Stearns, Frank J. Walton, Norman B. Livermore, and James E. Jenkins to intervene as party pltf.; P&A; affidavit c/s 12-26-74. (app. of Talmadge R. Jones, Deputy Attorney General) $5.00 paid & credited to United States.

Dec. 26, MOTION of State of California for order shortening time for hearing on motion to intervene; affidavit of Talmadge R. Jones; c/s 12-26-74. (fiat) (N) Pratt, J.

Dec. 26, ORDER shortening time for applicants intervenors for leave to move Court for an order granting applicant leave to intervene as party pltf on 2 days notice being given to pltf & deft. (N) Pratt, J.

Dec. 26, ORDER granting motion of State of California to intervene and permitting same to fully participate in pltfs application for Preliminary Injunction set for hearing on three Judge Court set for December 30, 1974. (N) Pratt, J.

Dec. 26, INTERVENOR complaint of The State of California, Evelle J. Younger, Ronald Reagan, Verne Orr, James G. Stearns, Frank J. Walton, Norman Livermore, Jr. and James E. Jenkins vs. Peter J. Brennan; c/s 12-26-74.

Dec. 27, MOTION of deft. to dismiss and opposition to pltffs' motion for preliminary injunction; Affidavit of Jack I. Karlin; Memorandum; c/s 12-27-74.

Dec. 27, APPLICATION of pltf. State of California, et al for preliminary injunction.

Dec. 27, REQUEST by Nathan Dodell, AUSA re: filing of attached letter dated Dec. 26, 1974, from Arnold T. Aikens, AUSA, to Charles S. Rhyne, Esq; attachment; c/m 12/27/74.

Dec. 30, MOTION of The State of Indiana, et al to intervene as parties pltf.; Notice; c/s 12/30/74. $5.00 paid & credited to U.S. by Rhyne.

Dec. 30, REPLY by pltfs. to motion by deft. to dismiss and opposition by deft. to motion by pltfs. for preliminary injunction; c/s 12/30/74.

Dec. 30, SUPPLEMENTARY affidavit of Jack I. Karlin; c/s & c/m.

Dec. 30, ADDITIONAL deposition exhibit by deft.

Dec. 30, AMENDED paragraph 39 of complaint by pltfs.; c/s 12/30/74.

Dec. 30, MOTION of pltf. for preliminary injunction and motion of deft. to dismiss heard and taken under advisement; motion of State of Indiana, et al to intervene granted. (Reporter: Dennis Bossard) Gasch, J., Leventhal, J., Parker, J.

Dec. 30, APPEARANCE of Talmadge R. Jones, Dep. Attorney General, State of California as counsel for pltfs.-intervenors, State of California, et al.

Dec. 30, APPEARANCE of Donald P. Bogard, Asst. Attorney General, State of Indiana, et al as counsel for pltfs.-intervenors, State of Indiana, et al.

Dec. 30, ORDER granting motion of the State of Indiana, State of Iowa, State of Maryland, State of Massachusetts, State of Mississippi, State of Missouri, State of Montana, State of Nebraska, State of Nevada, State of New Hampshire, State of Oklahoma, State of Oregon, State of South Carolina, State of South Dakota, State of Texas, State of Utah and the State of Washington to intervene as party-pltfs.; complaint filed Dec. 12, 1974, shall stand as complaint of record for intervenor-states. (N) Gasch, J.

Dec. 30, MOTION of the State of Indiana, et al for order shortening time for hearing on motion to intervene; affidavit of Charles S. Rhyne.

Dec. 30, ORDER shortening time for State of Indiana, et al, applicants-intervenors to intervene as parties pltf. (N) Gasch, J.

Dec. 30, APPLICATION of pltf.-intervenors, State of Indiana, et al, for preliminary injunction.

Dec. 31, ORDER denying motion of plaintiffs for preliminary injunction and granting motion of deft. to dismiss complaint. (N) Gasch, J., Leventhal, J., Parker, J.

Dec. 31, NOTICE of appeal by plaintiffs and intervenor-pltfs. to Supreme Court of the United States from order to Dec. 31, 1974. $5.00 paid and credited to U.S. by Rhyne.

1975

Jan. 6, NOTICE of appeal by pltf.-intervenor, The State of California, et al to Supreme Court of the United States from order of Dec. 31, 1974; c/m 1/3/75.

Jan. 8, CERTIFIED copy order Supreme Court of the United States Staying action pending further order of the Court. (signed 12/31/74) Burger, Chief Justice.

Jan. 13, DEPOSIT by Talmadge R. Jones, Deputy Attorney General, State of Calif. the sum of $5.00 for notice of appeal filed 1/6/75.

Jan. 14, COPY of letter from Supreme Court of the United States dated 1/13/75 continuing stay granted on 12/31/74 on condition that the appellant file jurisdictional statement on or before 1/17/75, and appellee file reply on or before 12:00 P.M., 1/23/75.

Jan. 31, CERTIFIED copies of orders (2) from Supreme Court of the United States noting probable jurisdiction.

Feb. 6, LETTER from Clerk, Supreme Court of the United States requesting certification and transmittal of entire record to Supreme Court.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The NATIONAL LEAGUE OF CITIES,
an Illinois Corporation, on
behalf of its member cities,
1620 Eye Street, N. W.,
Washington, D. C. 20006,

The NATIONAL GOVERNORS' CONFERENCE,
a District of Columbia Corporation,
on behalf of its members,
1150 Seventeenth Street, N. W.,
Washington, D. C. 20036,

The State of ARIZONA
N. Warner Lee, Attorney General
State Capitol
Phoenix, Arizona 85007,

METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON
COUNTY, Tennessee
Milton H. Sitton, Director of Law
204 Courthouse
Nashville, Tennessee 37201,

The City of SALT LAKE CITY, Utah
Roger F. Cutler, City Attorney
101 City and County Building
Salt Lake City, Utah 84114,

Civil Action
No. 74-1812

The City of LOMPOC, California
Alan Davidson, City Attorney
119 West Walnut Avenue
Lompoc, California 93436,

The City of CAPE GIRARDEAU, Missouri
Thomas Utterback, City Attorney
Office of the City Attorney
Cape Girardeau, Missouri 63701,

Plaintiffs,

v.

The Honorable PETER J. BRENNAN
Secretary of Labor
of the United States,

Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT THAT THE 1974 AMENDMENTS TO THE FAIR LABOR STANDARDS ACT UNCONSTITUTIONALLY ATTEMPT TO REGULATE ESSENTIAL STATE AND LOCAL GOVERNMENT FUNCTIONS, AND FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF.

1. This action arises under the Fair Labor Standards Act (hereinafter sometimes "Act"), 52 Stat. 1060, as

amended, 29 U.S.C. §201 *et seq.* This Court has jurisdiction, as this is an action relating to commerce, under 28 U.S.C. §1337.

2. This action further arises under the Constitution of the United States and the Fifth, Tenth and Eleventh Amendments to the Constitution of the United States. The matter in controversy, exclusive of interests and costs, exceeding the sum of ten thousand dollars, this Court has jurisdiction under 28 U.S.C. §1331.

3. Public Law 93-259, 88 Stat. 55 amending 29 U.S.C. §201 *et seq.*, (hereinafter sometimes "1974 Amendments") became effective on May 1, 1974. Provisions of the 1974 Amendments to the Act relating to police and fire protection personnel become effective on January 1, 1975. Plaintiffs challenge specifically the constitutionality of the following provisions of the Act as amended; in §3(d), the definition of "employer" is amended to include a "Public Agency"; in §3(e)(2), the definition of "employee" is amended to exclude in the case where the employer is a State public agency, only persons who are (1) not subject to a State's civil service laws and (2) publicly elected, or member of the personnel staff, or policy making appointee, or immediate legal advisor of one publicly elected; in §3(h), the definition of "industry" is amended to include "other activity" in addition to the original trade business or industry language; in §3(r), the definition of "enterprise" is amended to include within the activities deemed to be performed for a business purpose, those activities performed by any person in connection with the activities of a public agency; in §3(s), the definition of "Enterprise engaged in commerce or in the production of goods for commerce" is amended to include an activity

of a public agency and to state that, "The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling or otherwise working on goods or materials that have been moved in or produced for commerce"; in § 3(x), "public agency" is defined to include: "the Government of a State or political subdivision thereof; any agency of . . . a State or political subdivision of a State; or any interstate governmental agency"; in § 6(b), specific rates of compensation are provided for newly covered employees; in § 7(k), a limited and diminishing exemption for police and fire protection employees is created, which exemption is also stated in §13(b)(20); both § 7(k) and § 13(b)(20) become effective January 1, 1975; in § 13(b)(7) the former overtime exemption for local transit companies, now including publicly owned transit companies, doing an annual business of less than $250,000 is to be phased out by May 1, 1976; in §16(b), State employees are granted a cause of action against a public agency in "any Federal or State court of competent jurisdiction"; in § 16(c), the Secretary of Labor is authorized to bring an action for both liquidated damages and back pay on behalf of an employee subject to certain conditions.

4. Section 15 of the Act lists the prohibited acts as violations of §6, 7, 11, 12 or any regulations issued by the Secretary pursuant to his rulemaking powers under § 14.

5. Plaintiff National League of Cities has as members over 15,000 Cities who have over 2,000,000 employees. These Cities are political subdivisions of the 50 States. The National League of Cities also has as members State

municipal leagues, which leagues also have as members Cities who are political subdivisions of States. The National League of Cities is owned and operated by its member Cities and State municipal leagues, with said State leagues in turn being owned and operated by the leagues' member Cities in each State. The member Cities and State leagues govern the National League of Cities through an elected Board of Directors. The National League of Cities brings this action on its behalf and on behalf of each of its member Cities. Article I of its bylaws states its function as *inter alia*, "the adoption of a national municipal policy and its implementation as the chief vehicle for the development of effective municipal government."

6. Plaintiff National Governors' Conference is a non-profit organization incorporated on April 2, 1974, under the laws of the District of Columbia. The Conference was originally organized in 1908. Its membership is composed of the Governors of the several States of the United States, the Virgin Islands, Guam, American Samoa and the Commonwealth of Puerto Rico. As listed in Art. II of its Articles of Organization, the Conference is established *inter alia*: "to vigorously represent the interests of the states in the Federal system". The Conference brings this action on its own behalf and on behalf of its members.

7. Plaintiff Arizona is one of the fifty sovereign States of the United States. Acting in its sovereign governmental capacity, it performs essential functions which are necessary and indispensable to its existence as a sovereign State and which are required to be performed under its own Constitution and laws and under the Constitution and laws of the United States. Its unique

needs and the needs of its residents for essential governmental services are distinct from those of each of the other United States. Its Government structure, geography, climate, topography and demography require unique policy and personnel management decisions which in many respects differ from those made by the other States of the United States. It is not in competition with any of the other States or any private enterprise when making these decisions or performing these essential governmental functions. Arizona's decisions are made through a republican form of Government, by the votes of its citizens in elections conducted under its Constitution. It does not have the power, absent agreement, to enforce or effectuate its decisions beyond its own borders into any other State.

8. Plaintiff Metropolitan Nashville (pop. 447,877), a member of Plaintiff National League of Cities, is a metropolitan Government consisting of the City of Nashville and Davidson County established under the laws of the State of Tennessee. As a political subdivision of Tennessee, it shares in that State's sovereignty and performs essential functions which are necessary and indispensable to its existence as a political subdivision of Tennessee and which are required to be performed under its charter and ordinances, the Constitution and laws of Tennessee, and the Constitution and laws of the United States. Its unique needs and the needs of its residents for essential governmental services vary from the needs of other political subdivisions within Tennessee and are distinct from the needs of political subdivisions of each of the other United States. Its Government structure, geography, climate, topography and demography require unique policy and personnel management decisions which

may vary from those of other political subdivisions within Tennessee and which in many respects differ from those made by political subdivisions of the other United States. It is not in competition with any other political subdivisions within or without Tennessee or any private enterprise when making these decisions or performing these essential functions. Instead, it acts through the republican form of its State Government in conjunction with its own municipal Government, through officials elected by the votes of its citizens. It does not have the power, absent agreement, to enforce or effectuate its decisions beyond its State-designated jurisdictional boundaries and beyond the Tennessee borders into any other State.

9. Plaintiff Salt Lake City (pop. 175,885), a member of Plaintiff National League of Cities, is a City established under the laws of the State of Utah. As a political subdivision of Utah, it shares in that State's sovereignty and performs essential functions which are necessary and indispensable to its existence as a political subdivision of Utah and which are required to be performed under its own laws, the Constitution and laws of Utah, and the Constitution and laws of the United States. Its unique needs and the needs of its residents for essential governmental services vary from the needs of other political subdivisions within Utah and are distinct from the needs of political subdivisions of each of the other United States. Its Government structure, geography, climate, topography and demography require unique policy and personnel management decisions which vary from those of other political subdivisions within Utah and which in many respects differ from those made by political subdivisions of the other United States. It is not

in competition with any other political subdivisions within or without Utah or any private enterprise when making these decisions or performing these essential functions. Instead, its decisions are made through the republican form of its State Government in conjunction with its own municipal Government, by those elected by the votes of its citizens. It does not have the power, absent agreement, to enforce or effectuate its decisions beyond its State-designated jurisdictional boundaries and beyond the Utah borders into any other State.

10. Plaintiff Lompoc (pop. 25,600), a member of Plaintiff National League of Cities through membership in the League of California Cities, is a City established under the laws of the State of California. As a political subdivision of California, it shares in that State's sovereignty and performs essential functions which are necessary and indispensable to its existence as a political subdivision of California and which are required to be performed under its own laws the Constitution and laws of California, and the Constitution and laws of the United States. Its unique needs and the needs of its residents for essential governmental services vary from those of other political subdivisions within California and are distinct from the needs of political subdivisions of each of the other United States. Its Government structure, geography, climate, topography and demography require unique policy and personnel management decisions which vary from those of other political subdivisions within California and which in many respects differ from those made by political subdivisions of the other United States. It is not in competition with any other political subdivisions within or without California or any private enterprise when

making these decisions or performing these essential functions. Instead, its decisions are made through the republican form of its State Government in conjunction with its own municipal Government officials elected by the votes of its citizens. It does not have the power, absent agreement, to enforce or effectuate its decisions beyond its State-designated jurisdictional boundaries and beyond the California borders into any other State.

11. Plaintiff Cape Girardeau (pop. 31,282), a member of Plaintiff National League of Cities, is a City established under the laws of the State of Missouri. As a political subdivision of Missouri, it shares in that State's sovereignty and performs essential functions which are necessary and indispensable to its existence as a political subdivision of Missouri and which are required to be performed under its own laws, the Constitution and laws of Missouri, and the Constitution and laws of the United States. Its unique needs and the needs of its residents for essential governmental services vary from the needs of other political subdivisions within Missouri and are distinct from the needs of political subdivisions of each of the other United States. Its Government structure, geography, climate, topography and demography require unique policy and personnel management decisions which vary from those of other political subdivisions within Missouri and which in many respects differ from those made by political subdivisions of the other United States. It is not in competition with any other political subdivisions within or without Missouri or any private enterprise when making these decisions or performing these essential functions. Instead, it is governed through the republican form of its State Government in conjunction with its own municipal Government by the

officials elected by the votes of its citizens. It does not have the power, absent agreement, to enforce or effectuate its decisions beyond its State-designated jurisdictional boundaries and beyond the Missouri borders into any other State.

12. Defendant, Peter J. Brennan, is the Secretary of Labor of the United States, who is charged by law with the implementation and enforcement of the Act.

13. The City of Cape Girardeau, Missouri, has officially stated in a letter to Defendant's Regional Solicitor of Labor, dated October 15, 1974, that it will not comply with the 1974 Amendments, because the Act is unconstitutional. It will not therefore make itself available for Federal audits or inspections of any kind by Defendant.

14. On November 20, 1974, Defendant herein notified Plaintiff herein, the City of Cape Girardeau, of a civil action to be filed imminently against Cape Girardeau in the United States District Court for the Eastern District of Missouri, Southeastern Division, alleging violation by Cape Girardeau of §§ 6(b) and 15(a) (2) of the Act and demanding an injunction forcing Cape Girardeau to pay the overtime compensation required under the Act.

15. The City of Lompoc, California, after exchange of correspondence with the agent of Defendant herein, the Chief of the Division of Minimum Wage and Hours Standards of the Department of Labor, and a determination by Defendant and his agent that 29 C.F.R. § 778 prohibiting the use of compensatory time off beyond the work period applied to State and local Government, has indicated by its City Attorney the decision to continue the practice of awarding compensatory time off under existing local law and

procedures on the bases that, (1) the Act itself does not prohibit the use of compensatory time off and, (2) the Act, being unconstitutional, cannot invalidate said practice.

16. Plaintiffs States and Cities provide the following essential Government services, among others, each of which will be affected in cost or quality, or both, by the 1974 Amendments to the Act: police protection services; fire protection services; highway repair and snow removal services; trash collection, sewage treatment and other sanitation and health services; park maintenance and other recreational services; libraries; state and local administrative and regulatory agencies which enforce laws and regulations preserving the public health, safety and welfare, including inspection of buildings, licensing of occupations and businesses, administration of public assistance in emergency and poverty situations, preservation of environmental quality, administration of election, legislative, executive and judicial processes, administration of regulations preserving both public order and free expression of views and information, protection of the public against fraud and sharp practice; non-elected, non-appointed personnel such as tax collectors involved in non-competitive governmental functions which are done or can only be done exclusively by Government. In providing these essential Government services, Plaintiffs extensively use voluntary boards and commissions, whose members are not compensated, or who are paid nominal compensation. The Act makes use of these voluntary boards, commissions and workers financially impossible.

17. These said essential Government services inhere in the existence of States and their political subdivisions.

Without these essential Government services a State could not exist for the protection and benefit of the people within the territory of the State.

18. States and Cities, as political subdivisions of a State, cannot fail or refuse to provide these essential Government services consistently with provisions of State Constitutions, laws, charters, ordinance provisions and provisions of the United States Constitution.

19. Plaintiffs States and Cities have exercised their sovereign judgment in establishing personnel policies which will insure the most effective provision of essential Government services at the least cost to the taxpayers of Plaintiffs, consistently with fairness in compensating and regulating the working hours and conditions of the employees of Plaintiffs who provide essential Government services.

20. Under the Tenth Amendment of the Constitution of the United States one of the most vital sovereign powers reserved to the States is the power to employ personnel to carry out essential governmental functions and to completely control by rules, regulations and orders the performance of said employees in carrying out said essential governmental functions.

21. States and Cities have developed law on personnel, including civil service laws, designed to take care of the unique governmental situation of each State and each City as to industry, weather, and similar considerations. The Act, and its Regulations, purport to nullify such State and local legislation and impose uniform nationwide Federal rules and Regulations for all State and City. personnel. For this imposition there is no rational basis.

22. Plaintiff State of Arizona operates under Arizona constitutional and law provisions providing essential Government services, and in performing other functions, through its State and City employees. These law provisions include: a minimum wage for minors which applies to employment in "any industry, trade, business or branch thereof", Ariz. Rev. Stat. §§23--311-29 (1974 Supp.); a requirement that each City or town of more than seven thousand inhabitants, having a salaried police and fire department, pay a minimum wage to every foot patrolman and horseman after the third year of employment, Ariz. Rev. Stat. § 9-902 (1965); a constitutional provision defining a lawful day's work in all employment by, or on behalf of, the State or any of its political subdivisions, Ariz. Const. Art. XVIII, § 1; *State* v. *Boykin*, 109 Ariz. 289, 508 P. 2d 1151 (1973); legislation providing overtime compensation for work by public employees performing manual or mechanical labor, Ariz. Rev. Stat. § 23-391 (1974 Supp.).

23. Plaintiff City of Salt Lake operates under Utah State constitutional and law provisions in providing essential governmental services, and in performing through its employees. These law provisions include: a minimum wage provision for women and minors, an industrial commission to oversee wages and working conditions and to set maximum hours, a wage board made up of industry and employee representatives to determine the minimum wage, Utah Code, §34--22-5 *et seq.* (Supp. 1973); a constitutional provision defining a day's work on all works or undertakings carried on or aided by the State, County or Municipal Governments, Utah Const. Art. XVI, § 6; a requirement that State and local Government employees working on the

construction of public works excluding maintenance work, must be paid the general prevailing wage rate for work of a similar character in the locality, Utah Code, §34--30-2 (Supp. 1973), and a provision for overtime compensation, Utah Code, §34--30-8 (Supp. 1973).

24. Plaintiff, Metropolitan Government of Nashville and Davidson County operates under the Tennessee State laws in providing essential governmental services, and in performing all other functions, through its employees. These laws include a provision making it unlawful for any "person, firm, corporation or association of any kind" to deny employment because of affiliation with a labor organization, Tenn. Code § 50-208 (1956).

25. Plaintiff City of Cape Girardeau operates under Missouri State laws in providing essential governmental services and in performing other functions through its employees. These laws include a provision regulating child labor, Vern. Ann. Mo. Stat., §294.011 *et seq.* (1971); regulation of wages on public works, requiring that those employed in the construction of public works, including highways, must be paid the prevailing hourly rate for work of a similar character in the locality in which the work is performed, Vern. Ann. Mo. Stat., § 290.210 *et seq.* (1971), as amended (Supp. 1974); laws regulating police and firemen hours, Vern. Ann. Mo. Stat., §§ 85.290, 85.100 (1971); a provision allowing with certain exceptions State and local Government employees to join labor organizations and bargain collectively, Vern. Ann. Mo. Stat., §105.500 *et seq.* (Supp. 1974); a provision that, with respect to firefighters, a firemen's arbitration board will be appointed, at the request of either the employees or the governing body, to resolve disputes over wages, hours, and conditions of employment, Vern. Ann. Mo. Stat., §290.350 *et seq.* (1971).

26. Plaintiff City of Lompoc operates under California State laws in providing essential governmental services, and in performing other functions through its employees. These law provisions include a minimum wage law applicable to persons "employed in any occupation, trade or industry" establishing an industrial commission to determine whether wages in any occupation are inadequate to supply the cost of living and commission representatives to determine the appropriate minimum wage, Cal. Labor Code, §§ 1171-1199 (Deering Supp. 1974); provisions defining the workweek of the State employee, and authorizing the State personnel board to provide overtime compensation for State employees, Cal. Govt. Code, §§ 18020, 18021.5 (Deering 1973); specific statutes granting State and local firefighters the right to join labor organizations and bargain collectively, Cal. Labor Code, §§ 1960-1962 (Deering 1964); statutes which grant State employees and employees of public agencies the right to join labor organizations and bargain collectively, requiring that the State and other public employers confer with employee representatives, and provide for mediation of unresolved disputes through either local procedures or through the Department of Industrial Relations, Cal. Govt. Code, §§ 3500-10, 3525-36 (Deering 1973).

27. In programs developed by experience for the most efficient fulfilling of responsibilities to their citizens and others within their territory, Plaintiffs have implemented the use of compensatory time off, which under the 1974 Amendments to the Act, Plaintiffs would no longer be able to maintain. Compensatory time off is the payment of overtime in the form of paid time off at some future date convenient to both employer and employee. It

allows the employee to have more freedom to choose his time off and more time off. It avoids demeaning and wasteful "make-work" projects during slow periods. It allows the employer to most efficiently deal with many areas of Government which involve "peak" employment problems. It has been enthusiastically supported by employees who welcome the flexible approach it represents, and its invalidation under the 1974 Amendments has created severe morale problems.

28. In programs developed by experience for the most efficient fulfilling of responsibilities to their citizens and others within their territory, Plaintiffs have implemented the use of paid volunteers, which under the 1974 Amendments to the Act, Plaintiffs would no longer be able to maintain. Paid volunteers are compensated on a per-job or monthly fee basis constituting a nominal stipend for the work done. Many States and Cities pay paid volunteers a wage sufficient only to make these employees eligible for workmen's compensation under State laws. This practice is most prevalent in police and fire protection services. Under Defendant's proposed Regulations for police and fire personnel, § 553.10, intended to be effective January 1, 1975, any stipend beyond reimbursement of out-of-pocket expenses, and other limited exceptions destroys the volunteer status and subjects the policeman or fireman to the Act. This will seriously curtail service now provided by the numerous small, independent volunteer fire departments across the country. The practice of paid volunteers is similarly employed, and will result in similar added expense or diminution of service in areas such as poll workers in elections, and parks, recreation and government projects for involvement of the young, elderly and disadvantaged in the community.

29. In programs developed by experience for the most efficient fulfilling of responsibilities to their citizens and others within their territory, Plaintiffs have implemented the use of joint employment, which under the 1974 Amendments to the Act, Plaintiffs would no longer be able to maintain. Joint employment is the employment of personnel in more than one capacity within the State and City Government, whereby many full-time workers augment their income by part-time jobs in other areas of Government employment. Under Defendant's proposed Regulations for police and fire personnel, §553.8, intended to be effective January 1, 1975, if the part-time employment involves activities other than police and fire protection, it is possible to lose the exemption provided in § 7(k) of the Act, subjecting police and firefighters to the 40 hour week required by § 7(a). In areas other than police and fire protection, all hours worked for the State or political subdivision, regardless of which agency or department, must be counted towards the hours worked for that week. The requirement of the Act to pay overtime rates for part-time jointly employed personnel will force the end of this practice, which has been beneficial to employer and employee alike.

30. In programs developed by experience for the most efficient fulfilling of responsibilities to their citizens and others within their territory, Plaintiffs have implemented the use of mutual aid police and fire agreements, which under the 1974 Amendments to the Act, Plaintiffs will no longer be able to maintain. Mutual aid agreements allow the pooling of police or fire protection during emergencies or disasters which by their immediacy and gravity are too large for a single agency to combat. The participating agencies generally do not charge for the aid

rendered during such emergencies and disasters. However, under Defendant's proposed Regulations for police and fire personnel, § 553.9, intended to be effective January 1, 1975, all hours worked in aid of other jurisdictions must be counted towards hours worked in the home jurisdiction. This requirement forces the choice between abandoning these agreements, or massive unexpected overtime expenses whenever an emergency situation arises. These overtime expenses, by reason of their unpredictability, present a massive hidden liability which could itself bankrupt smaller political subdivisions.

31. In many other programs developed by experience for the most efficient fulfilling of responsibilities to their citizens and others within their territory, Plaintiffs have implemented the use of employment policies other than those described in Paragraphs 27 through 30 which under the 1974 Amendments to the Act, Plaintiffs would no longer be able to maintain.

32. The Fair Labor Standards Act was enacted in 1938 and has been amended in 1940, 1949, 1955, 1956, 1961, 1963, 1965, 1966, 1972 and 1974. Under the original Act and under amendments prior to the 1966 Amendments, Plaintiffs States and Cities were specifically and unqualifiedly exempted from the Act. The 1974 Amendments, 88 Stat. 55, in express terms include Plaintiffs under the definition of "public agency".

33. The 1974 Amendments to the Act, subject Plaintiffs States and Cities to hundreds of rules, Regulations and interpretations allegedly implementing the Act (29 C.F.R., sections 500-1899) and these rules, Regulations and interpretations are now applicable to the newly covered State and local employees. The most recent proposed addition to this volume of Regulations

are proposed rules pertaining to "Employees of Public Agencies Engaged in Fire Protection or Law Enforcement Activity (Including Security Personnel in Correctional Institutions)", 39 Fed. Reg. 38663-66 (1974).

34. In addition, Plaintiffs are subject to Opinion Letters of the Wage and Hour Division of the Department of Labor, many of which have been issued to date dealing with the extended coverage to State and local employees. Examples are: Opinion Letter No. 1325, stating that full-time student employees of a public library are not eligible under § 14 of the Act for wage payment at 85% of the minimum wage as employees of a retail or service establishment, since a library is engaged in the cultural improvement of a community, "a purpose entirely foreign to the accepted understanding of a 'retail' activity"; Opinion Letter No. 1328, stating that beaches operated by a municipal government are not seasonal industries under § 7(c) of the Act; Opinion Letter No. 1331, reiterating the narrow terms of the exemption for employees in the legislative branch of a State Government, stating that employees can be excluded from the Act's coverage only if outside the civil service laws of the governmental jurisdiction involved, and meeting one of the other requirements under § 3(e)(2)(c) (ii) and stating four criteria, also set out to determine if an employee "is selected by the holder of such an office to be a member of his personal staff" or "is appointed by such an officeholder to serve on a policymaking level" under § 3(e) (2) (c) (ii) (II) and (III) of the Act; Opinion Letter No. 1334, setting requirements counting volunteer time for City projects toward hours worked; Opinion Letter No. 1336,

exempting petit and grand jurors from coverage under the Act.

35. If constitutional, the Act conflicts with and replaces, by its hundreds of rules and Regulations, the State constitutional, and statutory provisions governing State and City personnel and civil services. The Act also replaces City Charter and ordinance provisions governing personnel and civil service.

36. The Act changes control of State and City employees from States and Cities to Federal control. For the first time in 200 years the Federal Government is claiming constitutional power to thus take over control of this vital internal Government function of States and Cities. The Federal Government's claim of constitutional power to impose employee age, wage, hour, and other personnel controls upon States and Cities is of such sweeping character as to effectively take over control not only of State and City personnel but of State and City budgets because personnel costs are usually a major item in said budgets. No more vital internal function of government exists for States and Cities than control of their employees and the budget items relating to said employees.

37. Unconstitutional interference with the sovereign governmental functions and internal affairs of Plaintiffs occurs through the claim by Defendant of power under the Act to impose upon Plaintiffs a vast number of Regulations, rules, interpretations and decisions issued by Defendant covering employee relations of Plaintiffs and requiring the making, keeping and preservation by Plaintiffs of vast amounts of specified records for numerous inspections by Defendant's enforcement and administrative officials.

38. The Act, Regulations promulgated thereunder and Opinions construing the Act, place Plaintiffs, and all States, political subdivisions and Cities under a massive burden of numerous Federal officers and employees, and remove ultimate control of State and local Government personnel services from States and localities and place that ultimate control in Defendant in Washington, D. C.

39. The Act and its Regulations are confusing, complicated, inequitable and so vague and incomprehensible as applied to State and City employees as to violate the Due Process Clause of the Fifth Amendment of the Constitution of the United States. Said Act and Regulations do not improve State and City personnel, or the services they render, and in many respects are irreparably damaging as they cause enormous expenses and, at the same time, a lessening of service. Existing State law, City Charter and ordinance provisions have been developed and adopted over the years to meet the unique situation of each State and City; and their laws, Charters and provisions are fair, reasonable and devoid of the problems and damage caused by the Act and the proposed Regulations thereunder.

40. The imposing of the Act's provisions and the implementing thereof by Defendant, and the Federal officers and employees acting under his direction and supervision, in replacement of State and City personnel law and State and City implementing officers and employees casts a vast unreasonable burden upon States and Cities. This damaging burden has no rational relation to commerce among the States and cannot be constitutionally based upon the Commerce Clause of the Constitution of the United States, and is in addition a direct violation of the Tenth Amendment of the Constitution of the United States.

41. The 1974 Amendments to the Act have caused and will cause to Plaintiffs irreparable injury and damage, and will irreparably injure and damage all Cities and States situated similarly to Plaintiffs, as described herein. The 1974 Amendments to the Act will require Plaintiffs States, political subdivisions and Cities to meet enormously increased costs in providing the same essential Government services provided presently. The ability of Plaintiffs to meet these increased costs, which will not be accompanied by increases in the services provided, is circumscribed by some State constitutional provisions limiting taxes and debts, the purpose of which is to safeguard the fiscal integrity of Plaintiffs States and Cities, for the benefit of the citizens thereof.

42. The 1974 Amendments to the Act will force Plaintiffs to forego planned new Government services, owing to the greatly increased cost of providing current or reduced essential Government services, said increased costs arising out of inflexible provisions of the Act rather than out of increased total costs of salaries for all municipal services.

43. The 1974 Amendments to the Act will make it substantially more difficult for Plaintiffs States and Cities to get and keep qualified employees to provide essential Government services, owing to the Amendments' and Act's effective prohibition of the employment practices such as compensatory time off and joint employment alleged in Complaint ¶¶ 27-31 *supra* which benefit employees of Plaintiffs.

44. The great diversity of State and local Governments makes full computation of the nationwide impact of these Amendments impossible. However, a recently released International City Management Association

(ICMA) study of fire protection services across the country provides a basis for determining the immense impact for that budget alone, which is but a fraction of each City's budget. The estimated 200,000 full-time paid firefighters constitute a conservatively estimated payroll of $2 billion annually. The extensive ICMA study indicates that there are three main groups of fire departments which will incur the most liability as a result of the Act: (1) those with an average number of hours per week greater than the 60 hours per week presently required (about 15% of the Cities sampled), (2) those with more than 28 days in their work periods (about 10% of those sampled), and (3) those who employ a pay back system whereby a fireman is paid for more hours than he works in each period but must pay back a certain number of shifts in a year (about 10% of those sampled). Allowing for overlap between these groups and calculating the average increase from the data gathered, the minimum impact for the first year on fire personnel budgets nationwide is estimated at a minimum of $200,000,000. By 1978 the estimated cumulative impact on fire personnel budgets is estimated to be $1 billion. This represents a 50% increase in fire protection costs after three years owing to the 1974 Amendments alone. Increased costs for other essential State and City governmental functions are reasonably certain to amount to billions of dollars per year due to the impact of these 1974 Amendments to the Act.

45. Plaintiff Metropolitan Government of Nashville and Davidson County has concluded that the 1974 Amendments to the Act will increase the cost of providing only essential police and fire protection, with no increase in service provided, and no increase in salary levels, by $938,000 per year.

46. Furthermore, Plaintiff Metropolitan Government of Nashville and Davidson County, Tennessee, estimates that about 40% of its policemen work in joint employment relationships for the State and Metropolitan Government, as defined in Defendant's new proposed Regulations for police and fire personnel (§ 553.8, intended to be effective on January 1, 1975). These police officers average at least 16 hours a week in this employment. If the proposed rules become effective it is possible that the Metropolitan Government would have to pay overtime on this 16 hours a week, resulting in an overtime payment of $19,000 per week or a total of approximately $1 million per year. The alternative to this added liability is to curtail necessary services.

47. Plaintiff Lompoc, California, will suffer vast as yet inestimable increased costs if it were to comply with the Act with no increase in salary levels and no increase in services provided.

48. Plaintiff Cape Girardeau, Missouri, estimates the present annual fire department budget of $350,000 would have to be increased by another $250,000 to $400,000 per year in order to comply with the Act. This would translate as an increase from the present expenditure rate of 50 cents per $100 assessed valuation to 90 cents per $100 assessed valuation. The citizens of Cape Girardeau cannot comply with such a drastic immediate increase in the cost of their Government.

49. Plaintiff City of Salt Lake will suffer the following irreparable injury as a result of the 1974 Amendments: the payment of time and one-half instead of compensatory time off for the more than 7000 overtime hours accumulated annually merely to provide necessary snow removal services; discontinuance of shift trading,

and flexible scheduling practices; increased costs for the hiring of, or elimination of students to work in the public parks each summer; increased costs for the hiring of, or elimination of student interns from the University of Utah; an estimated $500,000 in additional overtime costs and a diminution of some Government services to meet even this conservative estimate; and enormous morale problems.

50. Plaintiff Arizona estimates that for fiscal year 1975-76, the Act will require a $1.5 million increase in the cost of providing State police services, a $200,000 increase in the cost of providing State health services and a $300,000 increase in costs of highway services. This, coupled with additional employee related costs of $300,000, and $250,000 extra needed in highway construction costs, brings the estimated total impact of the Act for one year to over $2.5 million for the State of Arizona alone.

51. Member Cities of Plaintiff National League of Cities, in planning their budgets for upcoming years, have reported to Plaintiff National League of Cities many other illustrations of the irreparable injury they will suffer as a result of the Act with special damaging impact on such cities who up to now have depended on much volunteer public service. Examples are here set out in paragraphs 52 through 72.

52. Owing to the burdensome requirements of the 1974 Amendments, the City of Los Angeles, California (pop. 2,816,061) estimates an additional expense for fiscal year 1975-76 in the budget for salaries of fire personnel only, of over $2.5 million, plus an increase in pension costs of between $160,000 and $430,000. This increased cost is the result of time and one-half payment

for overtime and hiring of additional uniformed personnel with no increase in service. If in 1978, police workweeks are brought into parity with other employees under the Act the estimated overtime costs for that department alone would be between $4 and 6 million. These estimates presume the continuance of present salary levels and take into account no future increases in services provided.

53. Owing to the burdensome requirements of the 1974 Amendments, the Sacramento, California (pop. 254,413) budget for the current fiscal year 1974-75 has already incurred an extra $350,000 cost due merely to non-police and fire services. Also, the City's carefully developed system of compensatory time off, favored by management and employees alike, must now be abolished as illegal under the Amendments. In the area of fire protection services, a new Memorandum of Understanding will be negotiated between fire personnel and the City for fiscal year 1975-76. The uncertainty presented by the diminishing exemption under § 7(k) of the Act renders these negotiations nearly impossible. By January 1, 1977, in order to merely meet the Act's requirements in fire protection services, the City must either diminish services or hire 16-17 additional firefighters at a cost of $310,000 in 1974 firemen wages. If in 1978, the Secretary of Labor study (upon which, under the Act, workweeks will be based) should result in a 52 hour workweek, Sacramento's additional cost for present firefighting service would increase $636,000; if a 50 hour week is established, $993,000; if a 48 hour week is established, $1,379,000. Furthermore, conflict between the proposed Regulations for fire and police protection service and the already existing volume of

Regulations (29 C.F.R. §§ 500-1899) create uncertainties as to who is and who is not covered under the Act.

54. Owing to the burdensome requirements of the 1974 Amendments, Pasadena, California (pop. 113,327) estimates that in 1978 when the present police and fire personnel exemption could be expected to be in parity with the present requirement for others covered under the Act, the same level of fire protection service at the same wage rate would cost an additional $1.5 million representing a 50% increase over the current budget for such activities of $3 million.

55. Owing to the burdensome requirements of the 1974 Amendments the City of San Buenaventura, California (pop. 47,089) estimates its overtime costs for fire personnel to be $72,700 in 1975, $63,200 in 1976, $126,500 in 1977 and $31,600 for each additional hour the workweek is decreased by the 1978 survey. These increased costs represent an increased payroll cost by the end of 1977 of 29.1%.

56. Owing to the burdensome requirements of the 1974 Amendments, in Newark, California (pop. 27,153) an immediate impact of nearly $18,000 will be incurred just to meet the Act's new requirements for overtime for outside training, shift change, manning, call back and staff meetings. The costs of overtime and additional personnel to meet the Act's new hour requirements would range from $24,000 in 1977 to approximately $183,000 in 1978.

57. Owing to the burdensome requirements of the 1974 Amendments, Montebello, California (pop. 42,807) estimates its overall additional overtime costs to be $140,000 per year. In fire suppression service alone it

expects a 27.3% increase in overtime costs for 1975 with an estimated combined regular salary and overtime cost increase of $117,922 by the impact date of 1977. Its police department will be affected in that "Reserve" officers who previously worked on a call and emergency basis for a stipend of $25.00 per month, now may not work in excess of 12 and 1/2 hours a month. This program, therefore, has been effectively abolished.

58. Owing to the burdensome requirements of the 1974 Amendments, Menlo Park, California (pop. 26,734) in order to prevent diminution of services in the areas of crime prevention, traffic enforcement, case investigation and emergency incident response must spend an additional $120,000 annually.

59. Owing to the burdensome requirements of the 1974 Amendments, in Inglewood, California (pop. 87,985) the police department must curtail its effort to achieve affirmative action goals by providing employment opportunities for men and women interested in a career in law enforcement. Under the contractual arrangement trainees worked 20 hours per week at $3.57 per hour and books and tuition were provided free for the 20 hours per week of classes. Unable to meet the stricter financial burden placed on this program by the Act the City has been forced to abolish it.

60. Owing to the burdensome requirements of the 1974 Amendments, Clovis, California (pop. 13,856) must make a decision regarding its internship programs with California State University in Fresno to give students the opportunity to observe and participate, to a limited extent, in daily government operation. Students received as compensation, school credit and a small stipend. The Fair Labor Standards Act will cause the City

to eliminate the program or the pay for interns. Some students will have to be excluded from the program either way.

61. Owing to the burdensome requirements of the 1974 Amendments, Coronado, California (pop. 20,910) estimates additional overtime costs in its fire department alone of over $33,000 for 1975, over $59,000 for 1976 and over $111,000 for 1977.

62. Owing to the burdensome requirements of the 1974 Amendments, Sumter, South Carolina (pop. 23,895) estimates its overall additional overtime expense and wage increase will amount to $235,000 per year. In addition, the City of Sumter will have to terminate part-time firefighters who also work in other City departments.

63. Owing to the burdensome requirements of the 1974 Amendments in Lodi, California (pop. 28,691) the necessity that the work period be seven days rather than the previous practice of one month means extra costs in the computation of payrolls which Lodi must do mechanically, there not being the benefit of a computer available to the City.

64. Owing to the burdensome requirements of the 1974 Amendments, Downey, California (pop. 88,445) has been forced to abandon an effective proposal for twelve-hour police dispatcher shifts since the scheduling would have resulted in employees working less than 40 hours in some weeks while more than 40 hours in others with overtime costs incurred.

65. Owing to the burdensome requirements of the 1974 Amendments, in Randolph, New Jersey, some full-time employees no longer may serve as staff for volunteer boards or commissions. Since all of these hours

must be counted towards "hours worked" under the Act, this practice, helpful to the municipality and commission, must be discontinued and paid staff hired, increasing the cost to the City.

66. Owing to the burdensome requirements of the 1974 Amendments, Phoenix, Arizona (pop. 581,562) estimates that the elimination of "compensatory time" will result in an additional annual increased expenditure of $100,000.

67. Owing to the burdensome requirements of the 1974 Amendments, Tulsa, Oklahoma (pop. 331,638) estimates additional costs in its fire department at $126,700 for 1976 and $380,600 additional cost in 1977.

68. Owing to the burdensome requirements of the 1974 Amendments, Sunnyvale, California (pop. 75,408) estimates that additional costs for its public safety personnel overtime will be $169,000 for 1975, $186,000 for 1976 and over $204,000 for 1977.

69. Owing to the burdensome requirements of the 1974 Amendments, Corcoran, California (pop. 5,249) estimates a $49,000 per year increase to all City functions and that it must reduce training time and ambulance services.

70. Owing to the burdensome requirements of the 1974 Amendments, Columbia, South Carolina (pop. 113,542) estimates that by 1976 its fire protection salary budget will have to be increased by $110,000 in order to merely continue the service presently provided. Furthermore, since under the proposed Regulation (§ 553.6 intended to be effective on January 1, 1975) all job related training is compensable, and since training programs are difficult to arrange during scheduled work

hours for these departments, decreased in-service training is a likely result. Such decrease is just as damaging in the long run, and mitigates efficiency of police and fire services just as much, as an outright decrease in service.

71. Owing to the burdensome requirements of the 1974 Amendments, Richmond, Virginia (pop. 249,621) estimates that the hiring of necessary additional firefighters in order to maintain present service and still be in compliance with the Act will cost the City an additional $161,000.

72. Owing to the burdensome requirements of the 1974 Amendments, Reidsville, North Carolina (pop. 13,636) estimates increased police protection costs of $33,567 next year representing an increase of over 10% of the total annual police salary expenditure, and increased fire protection costs of $30,635 next year representing an increase of over 15% of the total annual fire salary expenditure.

73. In meeting the increased cost of providing the same essential government services currently provided, which increased cost the 1974 Amendments to the Act impose on Plaintiff Metropolitan Government of Nashville and Davidson County, it is limited by Article II, section 9 of the Constitution of Tennessee, which prohibits municipal income, estate and inheritance taxes.

74. In meeting the increased cost of providing the same essential Government services as currently provided, which increased cost the 1974 Amendments to the Act impose on Plaintiff Arizona, Plaintiff Arizona is limited by Article 9, section 5 of the Constitution of Arizona, which limits State debt. Political subdivisions of Plaintiff Arizona are limited by Article 9, section 8 of the Constitution of Arizona to a debt of four per centum of

taxable property without a special election and, in any case, ten per centum of taxable property.

75. In meeting the increased cost of providing the same essential Government services as currently provided, which increased cost the 1974 Amendments to the Act impose on Plaintiff Lompoc, Plaintiff Lompoc is limited by Article XIII, section 40 of the Constitution of California, which prohibits a City or other municipal corporation from incurring debts in excess of revenue for the current year without a special election.

76. In meeting the increased cost of providing the same essential Government services as currently provided, which increased cost the 1974 Amendments to the Act impose on Plaintiff Salt Lake City, Plaintiff Salt Lake City is limited by Article XIV, section 3 of the Constitution of Utah, which provides that Cities and other municipal corporations may not incur debts in excess of taxes for the current year. Article XIV, section 4 of the Constitution of Utah prohibits taxation by Cities and other municipal corporations in excess of four per centum of the value of taxable property.

77. In meeting the increased cost of providing the same essential Government services as currently provided, which increased cost the 1974 Amendments to the Act impose on Plaintiff Cape Girardeau, Plaintiff Cape Girardeau is limited by Article 6, section 26 of the Constitution of 1945 of Missouri, which prohibits Cities and political subdivisions of the State from incurring debts in excess of revenues for the current year, without a special election. Article 6, section 26(b) of the Constitution of 1945 of Missouri limits the excess of debt over revenue to five per centum of the value of taxable tangible property, even following such a special election.

78. Plaintiffs States, political subdivisions and Cities are and will be required by the 1974 Amendments to the Act to alter work schedules and other personnel policies of long standing and proven effectiveness, for no reasonable reason related to the effective provision of essential Government services to the people within Plaintiffs' jurisdictions. The only purpose to Plaintiffs for this alteration of schedules and policies is to minimize the overtime wages provided for under the Act as amended, so as to keep within budget law requirements.

79. Plaintiffs are further irreparably and immediately harmed in that § 16 of the Act imposes a $10,000 fine plus up to six months in prison for willful violations. Furthermore, any violation of § 6 or § 7 of the Act results in a civil liability of back pay plus an equal amount in liquidated damages. Thus, literally, each hour of the Act's application to Plaintiffs results in the potential of double damages in a suit under the Act.

80. The facts set forth herein demonstrate the irreparable harm imposed upon Plaintiffs for which Plaintiffs have no adequate remedy at law; Plaintiffs are entitled to a judgment adjudicating their rights and an injunction to prevent Defendant from enforcing this unconstitutional Act against Plaintiffs.

WHEREFORE, Plaintiffs demand judgment against Defendant, declaring the Fair Labor Standards Act as applied to States, Cities and political subdivisions of States to be unconstitutional and for the interlocutory, preliminary and permanent enjoining of Defendant from enforcing or attempting to enforce the Act against Plaintiffs or those situated similarly to Plaintiffs, and for

such other and additional relief as the facts alleged herein may warrant.

Respectfully submitted,

/s/ Charles S. Rhyne
Charles S. Rhyne
Rhyne & Rhyne
400 Hill Building
839 17th Street, N. W.
Washington, D. C. 20006

(202) 347-7992

Attorney for Plaintiffs

District of Washington, D. C.)
)

Allen E. Pritchard, Jr., being duly sworn, deposes and says that his business address is 1620 Eye Street, N.W., Washington, D.C., 20006; that he is Executive Vice President of National League of Cities, Plaintiff herein; and that he has read the foregoing Complaint and knows the contents thereof with respect to Cities and the National League of Cities; and that the same are true of his own knowledge.

/s/ Allen E. Pritchard, Jr.
Allen E. Pritchard, Jr.

Charles A Byrley, being duly sworn, deposes and says that his business address is 1150 Seventeenth Street, N.W., Washington, D.C. 20036; that he is Executive Director of National Governors' Conference, Plaintiff herein; and that he has read the foregoing Complaint and knows the contents thereof with respect to States and the National Governors' Conference; and that the same are true of his own knowledge.

/s/ Charles A. Byrley
Charles A. Byrley

Sworn and subscribed before me
this 12th day of December, 1974.

/s/ Daphne G. Rimmer
Notary Public

My Commission Expires March 31, 1977

Amended Paragraph 39 of the Complaint of National League of Cities *et al.*

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THE NATIONAL LEAGUE OF CITIES, et al.,	)	
Plaintiffs,	)	Civil Action
v.	)	No. 74-1812
THE HONORABLE PETER J. BRENNAN, Secretary of Labor,	)	
Defendant.	)	

AMENDED PARAGRAPH 39 OF COMPLAINT

The Act and its Regulations are confusing, complicated, inequitable and so vague and incomprehensible as applied to State and City employees as to violate the Due Process Clause of the Fifth Amendment of the Constitution of the United States. Furthermore, the Regulations to be effective January 1, 1975 violate the Fifth Amendment specifically because they fail to give adequate notice of conduct to be proscribed or the requirements necessary to come into compliance with the Act, as a result of their being issued in final form on December 20, 1974. Said Act and Regulations do not improve State and City personnel, or the services they render, and in many respects are irreparably damaging as they cause enormous expenses

and, at the same time, a lessening of service. Existing State law, City Charter and ordinance provisions have been developed and adopted over the years to meet the unique situation of each State and City; and their laws, Charters and provisions are fair, reasonable and devoid of the problems and damage caused by the Act and the proposed Regulations thereunder.

[Certificate omitted in printing]

Complaint in Intervention of the State of California

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THE NATIONAL LEAGUE OF CITIES,)
an Illinois Corporation, on)
behalf of its member cities,)
1620 Eye Street, N.W.,)
Washington, D.C. 20006,)
)
THE NATIONAL GOVERNORS')
CONFERENCE,)
a District of Columbia Corporation,)
on behalf of its members,)
1150 Seventeenth Street, N.W.,)
Washington, D.C. 20036,)
)
The State of ARIZONA)
N. Warner Lee, Attorney General)
State Capitol)
Phoenix, Arizona 85007,)
)
METROPOLITAN GOVERNMENT OF)
NASHVILLE AND DAVIDSON)
COUNTY, Tennessee)
Milton H. Sitton, Director of Law)
204 Courthouse)
Nashville, Tennessee 37201,)
)
The City of SALT LAKE CITY, Utah)
Roger F. Cutler, City Attorney)
101 City and County Building)
Salt Lake City, Utah 84114,)
)

The City of LOMPOC, California
Alan Davidson, City Attorney
119 West Walnut Avenue
Lompoc, California 93436,

The City of CAPE GIRARDEAU, Missouri
Thomas Utterback, City Attorney
Office of the City Attorney
Cape Girardeau, Missouri 63701,

Plaintiffs,

and

THE STATE OF CALIFORNIA,
State Capitol,
Sacramento, California 95814

by and through

EVELLE J. YOUNGER,
Attorney General, on
behalf of the People of
the State of California,

RONALD REAGAN,
Governor

VERNE ORR,
Director, Department of Finance

JAMES G. STEARNS
Secretary, Agriculture
and Services Agency

) Civil Action
) No. 74-1812

FRANK J. WALTON,
Secretary, Business
and Transportation Agency

NORMAN B. LIVERMORE, JR.
Secretary
Resources Agency

JAMES E. JENKINS
Secretary, Health and
Welfare Agency,

Plaintiffs-Intervenors,

v.

The Honorable PETER J. BRENNAN
Secretary of Labor
of the United States,

Defendant.

COMPLAINT IN INTERVENTION FOR DECLARATORY JUDGMENT THAT THE 1974 AMENDMENTS TO THE FAIR LABOR STANDARDS ACT UNCONSTITUTIONALLY ATTEMPT TO REGULATE ESSENTIAL STATE AND LOCAL GOVERNMENT FUNCTIONS, AND FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF.

Intervenors allege:

1. This action arises under the Fair Labor Standards Act (hereinafter sometimes "Act"), 52 Stat. 1060, as amended, 29 U.S.C. § 201 *et seq.* This Court has jurisdiction, as this is an action relating to commerce, under 28 U.S.C. § 1337.

2. This action further arises under the Constitution of the United States and the Fifth, Tenth, and Eleventh Amendments to the Constitution of the United States. The matter in controversy, exclusive of interests and costs, exceeds the sum of ten thousand dollars; this Court has jurisdiction under 28 U.S.C. § 1331. Jurisdiction is also based on § 1346 of Title 28, United States Code, which provides that the District Courts shall have original jurisdiction of any other civil action founded either upon the Constitution or any act of Congress; and on the Federal Declaratory Judgment Act (28 U.S.C. §§ 2201, 2202) and the laws of the United States of America.

3. Public Law 93-259, 88 Stat. 55 amending 29 U.S.C. § 201 *et seq.*, (hereinafter somes "1974 Amendments") became effective on May 1, 1974. Provisions of the 1974 Amendments to the Act relating to police and fire protection personnel become effective on January 1, 1975. Plaintiffs challenge specifically the constitutionality of the following provisions of the Act as

amended: in § 3(d), the definition of "employer" is amended to include a "Public Agency"; in § 3(e)(2), the definition of "employee" is amended to exclude in the case where the employer is a State public agency, only persons who are (1) not subject to a State's civil service laws and (2) publicly elected, or member of the personnel staff, or policy making appointee, or immediate legal advisor of one publicly elected; in § 3(h), the definition of "industry" is amended to include "other activity" in addition to the original trade business or industry language; in § 3(r), the definition of "enterprise" is amended to include within the activities deemed to be performed for a business purpose, those activities performed by any person in connection with the activities of a public agency; in § 3(s), the definition of "Enterprise engaged in commerce or in the production of goods for commerce" is amended to include an activity of a public agency and to state that, "The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling or otherwise working on goods or materials that have been moved in or produced for commerce"; in § 3(x), "public agency" is defined to include: "the Government of a State or political subdivision thereof; any agency of . . . a State or political subdivision of a State; or any interstate governmental agency"; in § 6(b), specific rates of compensation are provided for newly covered employees; in § 7(k), a limited and diminishing exemption for police and fire protection employees is created, which exemption is also stated in § 13(b)(20); both § 7(k) and § 13(b)(20) become effective January 1, 1975; in § 13(b)(7) the

former overtime exemption for local transit companies, now including publicly owned transit companies, doing an annual business of less than $250,000 is to be phased out by May 1, 1976; in § 16(b), State employees are granted a cause of action against a public agency in "any Federal or State court of competent jurisdiction"; in § 16(c), the Secretary of Labor is authorized to bring an action for both liquidated damages and back pay on behalf of an employee subject to certain conditions.

4. Section 15 of the Act lists the prohibited acts as violations of §§ 6, 7, 11, 12 or any regulations issued by the Secretary pursuant to his rulemaking powers under § 14.

5. Plaintiff State of California is a sovereign State of the United States of America. Acting in its sovereign governmental capacity, it performs essential functions which are necessary and indispensable to its existence as a sovereign State; said functions are required to be performed under its own Constitution and laws and under the Constitution and laws of the United States. Its unique needs and the needs of its residents for essential governmental services are distinct from those of each of the other United States. Its government structure, geography, climate, topography and demography require unique policy and personnel management decisions which in many respects differ from those made by the other states of the United States. The State of California is not in competition with any of the other states, or with any private enterprise, when making these decisions or performing these essential governmental functions. California's decisions are made through a republican form of government, by the votes of its citizens in elections conducted under its Constitution. It does not have the

power, absent agreement, to enforce or effectuate its decisions beyond its own borders into any other state.

6. Plaintiff Evelle J. Younger, Attorney General of the State of California, is the chief law enforcement officer of the State of California pursuant to Article V, Section 13 of the California Constitution, and brings this action in the name of the People of the State of California. The Attorney General possesses not only extensive statutory powers but also broad powers derived from the common law relative to the protection of the public interest, and has the power to file any civil action or proceeding in the federal courts directly involving the rights and interests of the State of California, or which the Attorney General deems necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights and interests. It is the concern and interest of the People of the State of California that State laws and legislative policies, including the State Civil Service Act (California Government Code, Title 2, Division 5, Section 18000, *et seq.*) and pertinent sections of the California Constitution (Article XXIV), be enforced.

7. Plaintiff Ronald Reagan is the duly elected and acting Governor of the State of California and is charged by Article V, Section 1 of the California Constitution to faithfully execute the laws of said State. Plaintiff Verne Orr is the duly-appointed Director of the Department of Finance of the State of California and as such has the power and the duty to supervise the fiscal and business policies of the State, and particularly to certify that funds for wages and salaries to be paid to State employees are in accordance with current budgeting provisions. Plaintiff Frank J. Walton is the

duly-appointed Secretary of the Business and Transportation Agency. Plaintiff Norman B. Livermore, Jr. is the duly-appointed Secretary of the Resources Agency of the State of California. Plaintiff James E. Jenkins is the duly-appointed Secretary of the Health and Welfare Agency of the State of California. Plaintiff James G. Stearns is the duly-appointed Secretary of the Agriculture and Services Agency of the State of California. Each of the four foregoing Agency Secretaries are vested with the duty and responsibility of advising and directing the many and various State departmental programs which fall within the respective jurisdiction of each Agency Secretary.

8. Plaintiff National League of Cities has as members over 15,000 Cities who have over 2,000,000 employees. These Cities are political subdivisions of the 50 States. The National League of Cities also has as members State municipal leagues, which leagues also have as members Cities who are political subdivisions of States. The National League of Cities is owned and operated by its member Cities and State municipal leagues, with said State leagues in turn being owned and operated by the leagues' member Cities in each State. The member Cities and State leagues govern the National League of Cities through an elected Board of Directors. The National League of Cities brings this action on its behalf and on behalf of each of its member Cities. Article I of its bylaws state its function as *inter alia*, "the adoption of a national municipal policy and its implementation as the chief vehicle for the development of effective municipal government."

9. Plaintiff National Governors' Conference is a non-profit organization incorporated on April 2, 1974,

under the laws of the District of Columbia. The Conference was originally organized in 1908. Its membership is composed of the Governors of the several States of the United States, the Virgin Islands, Guam, American Samoa and the Commonwealth of Puerto Rico. As listed in Article II of its Articles of Organization, the Conference is established *inter alia*: "to vigorously represent the interests of the states in the Federal system". The Conference brings this action on its own behalf and on behalf of its members.

10. Plaintiff Arizona is one of the fifty sovereign States of the United States. Acting in its sovereign governmental capacity, it performs essential functions which are necessary and indispensable to its existence as a sovereign State and which are required to be performed under its own Constitution and laws and under the Constitution and laws of the United States. Its unique needs and the needs of its residents for essential governmental services are distinct from those of each of the other United States. Its Government structure, geography, climate, topography and demography require unique policy and personnel management decisions which in many respects differ from those made by the other States of the United States. It is not in competition with any of the other States or any private enterprise when making these decisions or performing these essential governmental functions. Arizona's decisions are made through a republican form of Government, by the votes of its citizens in elections conducted under its Constitution. It does not have the power, absent agreement, to enforce or effectuate its decisions beyond its own borders into any other State.

11. Plaintiff Metropolitan Nashville (pop. 447,877), a member of Plaintiff National League of Cities, is a

metropolitan Government consisting of the City of Nashville and Davidson County established under the laws of the State of Tennessee. As a political subdivision of Tennessee, it shares in that State's sovereignty and performs essential functions which are necessary and indispensable to its existence as a political subdivision of Tennessee and which are required to be performed under its charter and ordinances, the Constitution and laws of Tennessee, and the Constitution and laws of the United States. Its unique needs and the needs of its residents for essential governmental services vary from the needs of other political subdivisions within Tennessee and are distinct from the needs of political subdivisions of each of the other United States. Its Government structure, geography, climate, topography and demography require unique policy and personnel management decisions which may vary from those of other political subdivisions within Tennessee and which in many respects differ from those made by political subdivisions of the other United States. It is not in competition with any other political subdivisions within or without Tennessee or any private enterprise when making these decisions or performing these essential functions. Instead, it acts through the republican form of its State Government in conjunction with its own municipal Government, through officials elected by the votes of its citizens. It does not have the power, absent agreement, to enforce or effectuate its decisions beyond its State-designated jurisdictional boundaries and beyond the Tennessee borders into any other State.

12. Plaintiff Salt Lake City (pop. 175,885), a member of Plaintiff National League of Cities, is a City established under the laws of the State of Utah. As a political subdivision of Utah, it shares in that State's sovereignty

and performs essential functions which are necessary and indispensable to its existence as a political subdivision of Utah and which are required to be performed under its own laws, the Constitution and laws of Utah, and the Constitution and laws of the United States. Its unique needs and the needs of its residents for essential governmental services vary from the needs of other political subdivisions within Utah and are distinct from the needs of political subdivisions of each of the other United States. Its Government structure, geography, climate, topography and demography require unique policy and personnel management decisions which vary from those of other political subdivisions within Utah and which in many respects differ from those made by political subdivisions of the other United States. It is not in competition with any other political subdivisions within or without Utah or any private enterprise when making these decisions or performing these essential functions. Instead, its decisions are made through the republican form of its State Government in conjunction with its own municipal Government, by those elected by the votes of its citizens. It does not have the power, absent agreement, to enforce or effectuate its decisions beyond its State-designated jurisdictional boundaries and beyond the Utah borders into any other State.

13. Plaintiff Lompoc (pop. 25,600), a member of Plaintiff National League of Cities through membership in the League of California Cities, is a City established under the laws of the State of California. As a political subdivision of California, it shares in that State's sovereignty and performs essential functions which are necessary and indispensable to its

existence as a political subdivision of California and which are required to be performed under its own laws, the Constitution and laws of California, and the Constitution and laws of the United States. Its unique needs and the needs of its residents for essential governmental services vary from those of other political subdivisions within California and are distinct from the needs of political subdivisions of each of the other United States. Its Government structure, geography, climate, topography and demography require unique policy and personnel management decisions which vary from those of other political subdivisions within California and which in many respects differ from those made by political subdivisions of the other United States. It is not in competition with any other political subdivisions within or without California or any private enterprise when making these decisions or performing these essential functions. Instead, its decisions are made through the republican form of its State Government in conjunction with its own municipal Government officials elected by the votes of its citizens. It does not have the power, absent agreement, to enforce or effectuate its decisions beyond its State-designated jurisdictional boundaries and beyond the California borders into any other State.

14. Plaintiff Cape Girardeau (pop 31,282), a member of Plaintiff National League of Cities, is a City established under the laws of the State of Missouri. As a political subdivision of Missouri, it shares in that State's sovereignty and performs essential functions which are necessary and indispensable to its existence as a political subdivision of Missouri and which are required to be·

performed under its own laws, the Constitution and laws of Missouri, and the Constitution and laws of the United States. Its unique needs and the needs of its residents for essential governmental services vary from the needs of other political subdivisions within Missouri and are distinct from the needs of political subdivisions of each of the other United States. Its Government structure, geography, climate, topography and demography require unique policy and personnel management decisions which vary from those of other political subdivisions within Missouri and which in many respects differ from those made by political subdivisions of the other United States. It is not in competition with any other political subdivisions within or without Missouri or any private enterprise when making these decisions or performing these essential functions. Instead, it is governed through the republican form of its State Government in conjunction with its own municipal Government by the officials elected by the votes of its citizens. It does not have the power, absent agreement, to enforce or effectuate its decisions beyond its State-designated jurisdictional boundaries and beyond the Missouri borders into any other State.

15. Defendant, Peter J. Brennan, is the Secretary of Labor of the United States, who is charged by law with the implementation and enforcement of the Act.

16. The City of Cape Girardeau, Missouri, has officially stated in a letter to Defendant's Regional Solicitor of Labor, dated October 15, 1974, that it will not comply with the 1974 Amendments, because the Act is unconstitutional. It will not therefore make itself available for Federal audits or inspections of any kind by

Defendant.

17. On November 20, 1974, Defendant herein notified Plaintiff herein, the City of Cape Girardeau, of a civil action to be filed imminently against Cape Girardeau in the United States District Court for the Eastern District of Missouri, Southeastern Division, alleging violation by Cape Girardeau of §§ 6(b) and 15(a) (2) of the Act and demanding an injunction forcing Cape Girardeau to pay the overtime compensation required under the Act.

18. The City of Lompoc, California, after exchange of correspondence with the agent of Defendant herein, the Chief of the Division of Minimum Wage and Hours Standards of the Department of Labor, and a determination by Defendant and his agent that 29 C.F.R. § 778 prohibiting the use of compensatory time off beyond the work period applied to State and local Government, has indicated by its City Attorney the decision to continue the practice of awarding compensatory time off under existing local law and procedures on the bases that, (1) the Act itself does not prohibit the use of compensatory time off and, (2) the Act, being unconstitutional, cannot invalidate said practice.

19. Plaintiffs States and Cities provide the following essential Government services, among others, each of which will be affected in cost or quality, or both, by the 1974 Amendments to the Act: police protection services; fire protection services; highway repair and snow removal services; trash collection, sewage treatment and other sanitation and health services; park maintenance and other recreational services; libraries; state and local administrative and regulatory agencies which enforce laws

and regulations preserving the public health, safety and welfare, including inspection of buildings, licensing of occupations and businesses, administration of public assistance in emergency and poverty situations, preservation of environmental quality, administration of election, legislative, executive and judicial processes, administration of regulations preserving both public order and free expression of views and information, protection of the public against fraud and sharp practice; non-elected, non-appointed personnel such as tax collectors involved in non-competitive governmental functions which are done or can only be done exclusively by Government. In providing these essential Government services, Plaintiffs extensively use voluntary boards and commissions, whose members are not compensated, or who are paid nominal compensation. The Act makes use of these voluntary boards, commissions and workers financially impossible.

20. These said essential Government services inhere in the existence of States and their political subdivisions. Without these essential Government services a State could not exist for the protection and benefit of the people within the territory of the State.

21. States and Cities, as political subdivisions of a State, cannot fail or refuse to provide these essential Government services consistently with provisions of State Constitutions, laws, charters, ordinance provisions and provisions of the United States Constitution.

22. Plaintiffs States and Cities have exercised their sovereign judgment in establishing personnel policies which will insure the most effective provision of essential Government services at the least cost to the

taxpayers of Plaintiffs, consistently with fairness in compensating and regulating the working hours and conditions of the employees of Plaintiffs who provide essential Government services.

23. Under the Tenth Amendment of the Constitution of the United States one of the most vital sovereign powers reserved to the States is the power to employ personnel to carry out essential governmental functions and to completely control by rules, regulations and orders the performance of said employees in carrying out said essential governmental functions.

24. States and Cities have developed law on personnel, including civil service laws, designed to take care of the unique governmental situation of each State and each City as to industry, weather, and similar considerations. The Act, and its regulations, purport to nullify such State and local legislation and impose uniform nationwide Federal rules and Regulations for all State and City personnel. For this imposition there is no rational basis.

25. Plaintiff State of California operates under California constitutional and statutory provisions providing essential and indispensable governmental services through its State employees. Appropriation of tax revenues necessary to fund the wages and salaries of California State employees is a legislative power (Cal. Const., Art. IV, § 1), and the authority to appropriate said monies resides with the California State Legislature (Cal. Const., Art. III); neither the State salary-fixing administrative authority (the California State Personnel Board), the executive branch, nor the judiciary, has the power to compel such legislative appropriation of money. *California State Emp. Association* v. *Flournoy*, 32 Cal. App. 3d 219, 234-235; 108 Cal.Rptr. 251 (1973);

California State Emp. Association v. *State of California*, 32 Cal.App.3d 104, 109; 108 Cal.Rptr. 60 (1973).

California State employees are appointed and promoted under a general system based on merit ascertained by competitive examination (Cal. Const., Art. XXIV), and are governed exclusively by the State Civil Service Act (Title 2, Cal. Govt. Code, Division 5, § 18000, *et seq.*) relative to appropriate hours, working conditions, and other matters concerning their State employment. Among its many comprehensive provisions, the State Civil Service Act provides:

a. That the policy of the State is that the workweek of the State employee shall be 40 hours, except to meet the varying needs of different State agencies; that the policy of the State is to avoid the necessity for overtime work whenever possible (Govt. Code, § 18020); that the State Personnel Board, when considering prevailing practice concerning overtime compensation may establish workweek groups of the same or different lengths with different methods of recognizing or providing compensation for overtime (*Ibid.*, § 18021); that either cash compensation (at 1 1/2 times the regular rate of pay) or compensatory time off (at 1 1/2 times each hour of overtime worked) may be provided by the State Personnel Board (*Ibid.*, § 18021.5); that the State should comply with those provisions of the Fair Labor Standards Act which the United States Supreme Court has found constitutional as applied to the sovereign states (*Ibid.*, § 18021.6);

b. That the normal workweek of permanent employees in fire suppression classes shall not exceed 84 hours per week; work in excess of 84 hours may be compensated in cash or compensating time off (*Ibid.*, §

18021.7); that compensating time off may be granted within twelve calendar months following the month in which the overtime was worked (*Ibid.*, § 18023); that the State Personnel Board may provide for rates or methods of compensation for overtime work, and in so doing shall consider the needs of State service and prevailing practice in private business and other public employment (*Ibid.*, § 18026);

c. That all provisions of the State Workmen's Compensation Law shall apply to all "firemen" of the State, whether such employees are partly paid, fully paid, or volunteers (*Ibid.*, §§ 18300, 18301, 18302);

d. That to secure substantial justice and equality in the State civil service, the State Personnel Board may provide by rule for days, hours, and conditions of work, taking into consideration the varying needs and requirements of the different State agencies and prevailing practices for comparable services in other public employment and in private business (*Ibid.*, § 18705);

e. That the State Personnel Board shall establish and adjust salary ranges for each class of position in the State civil service, based on the principle that like salaries shall be paid for comparable duties and responsibilities; the Board shall make no adjustments which require expenditures in excess of existing appropriations which may be used for salary increase purposes (*Ibid.*, § 18850); that in classes and positions with unusual conditions or hours of work or where necessary to meet prevailing rates and practices for comparable services in other public employment and in private business the State Personnel Board may establish more than one salary range for rate or method of compensation within a class

(*Ibid.*, § 18852); that automatic salary adjustments shall be made for employees in the State civil service unless there is not sufficient money available for that purpose in the appropriation for which such salaries are to be paid (*Ibid.*, § 18856);

f. That pursuant to the rules and regulations of the California State Personnel Board (Title 2, Calif. Adm. Code, Section 1, *et seq.*) the qualifying monthly pay period is a calendar month (*Ibid.*, §§ 6.1, 6.2); that in order to be compensable by cash or compensating time off, such overtime must be authorized in advance except in emergencies, and subsequently authorized in writing not later than ten days after the end of the pay period during which the overtime was worked (*Ibid.*, § 131); that the time when compensating time off may be taken is at the discretion of the appointing agency (*Ibid.*, § 134), and if the employee fails to take such compensating time off at the designated time, he shall have waived his right to compensation for such overtime (*Ibid.*, § 134); that both "in service training" and "out service training", and the conditions for the receipt of salary, tuition, or other necessary expenses therefor, are governed by regulations of the State Personnel Board (*Ibid.*, § 530, *et seq.*).

26. Plaintiff State of Arizona operates under Arizona constitutional and law provisions providing essential Government services, and in performing other functions, through its State and City employees. These law provisions include: a minimum wage for minors which applies to employment in "any industry, trade, business or branch thereof", Ariz. Rev. Stat. §§ 23–311-29 (1974 Supp.); a requirement that each City or town of more than seven thousand inhabitants, having a salaried police

and fire department, pay a minimum wage to every foot patrolman and horseman after the third year of employment, Ariz. Rev. Stat. § 9-902 (1965); a constitutional provision defining a lawful day's work in all employment by, or on behalf of, the State or any of its political subdivisions. Ariz. Const. Art. XVIII, § 1; *State* v. *Boykin*, 109 Ariz. 289, 508 P. 2d 1151 (1973); legislation providing overtime compensation for work by public employees performing manual or mechanical labor, Ariz. Rev. Stat. § 23-391 (1974 Supp.).

27. Plaintiff City of Salt Lake operates under Utah State constitutional and law provisions in providing essential governmental services, and in performing other functions, through its employees. These law provisions include: a minimum wage provision for women and minors, an industrial commission to oversee wages and working conditions and to set maximum hours, a wage board made up of industry and employee representatives to determine the minimum wage, Utah Code, § 34–22-5 *et seq*. (Supp. 1973); a constitutional provision defining a day's work on all works or undertakings carried on or aided by the State, County or Municipal Governments, Utah Const. Art. XVI, § 6; a requirement that State and local Government employees working on the construction of public works excluding maintenance work, must be paid the general prevailing wage rate for work of a similar character in the locality, Utah Code, § 34–30-2 (Supp. 1973), and a provision for overtime compensation, Utah Code, § 34–30-8 (Supp. 1973).

28. Plaintiff Metropolitan Government of Nashville and Davidson County operates under the Tennessee State laws in providing essential governmental services, and in performing all other functions, through its employees.

These laws include a provision making it unlawful for any "person, firm, corporation or association of any kind" to deny employment because of affiliation with a labor organization, Tenn. Code § 50-208 (1956).

29. Plaintiff City of Cape Girardeau operates under Missouri State laws in providing essential governmental services and in performing other functions through its employees. These laws include a provision regulating child labor, Vern. Ann. Mo. Stat., § 294.011 *et seq.* (1971); regulation of wages on public works, requiring that those employed in the construction of public works, including highways, must be paid the prevailing hourly rate for work of a similar character in the locality in which the work is performed, Vern. Ann. Mo. Stat., § 290.210 *et seq*. (1971), as amended (Supp. 1974); laws regulating police and firemen hours, Vern. Ann. Mo. Stat., §§ 85.290, 85.100 (1971); a provision allowing with certain exceptions State and local Government employees to join labor organizations and bargain collectively, Vern. Ann. Mo. Stat., § 105.500 *et seq.* (Supp. 1974); a provision that, with respect to firefighters, a firemen's arbitration board will be appointed, at the request of either the employees or the governing body, to resolve disputes over wages, hours, and conditions of employment, Vern. Ann. Mo. Stat., § 290.350 *et seq.* (1971).

30. Plaintiff City of Lompoc operates under California State laws in providing essential governmental services, and in performing other functions through its employees. These law provisions include a minimum wage law applicable to persons "employed in any occupation, trade or industry" establishing an industrial commission to

determine whether wages in any occupation are inadequate to supply the cost of living and commission representatives to determine the appropriate minimum wage, Cal. Labor Code, §§ 1171-1199 (Deering Supp. 1974); provisions defining the workweek of the State employee, and authorizing the State personnel board to provide overtime compensation for State employees, Cal. Govt. Code, §§ 18020, 18021.5 (Deering 1973); specific statutes granting State and local firefighters the right to join labor organizations and bargain collectively, Cal. Labor Code, §§ 1960-1962 (Deering 1964); statutes which grant State employees and employees of public agencies the right to join labor organizations and bargain collectively, requiring that the State and other public employers confer with employee representatives, and provide for mediation of unresolved disputes through either local procedures or through the Department of Industrial Relations, Cal. Govt. Code, §§ 3500-10, 3525-36 (Deering 1973).

31. In programs developed by experience for the most efficient fulfilling of responsibilities to their citizens and others within their territory, Plaintiffs have implemented the use of compensatory time off, which under the 1974 Amendments to the Act, Plaintiffs would no longer be able to maintain. Compensatory time off is the payment of overtime in the form of paid time off at some future date convenient to both employer and employee. It allows the employee to have more freedom to choose his time off and more time off. It avoids demeaning and wasteful "make-work" projects during slow periods. It allows the employer to most efficiently deal with many areas of Government which involve "peak" employment problems. It has been enthusiastically supported by

employees who welcome the flexible approach it represents, and its invalidation under the 1974 Amendments has created severe morale problems.

32. In programs developed by experience for the most efficient fulfilling of responsibilities to their citizens and others within their territory, Plaintiffs have implemented the use of paid volunteers, which under the 1974 Amendments to the Act, Plaintiffs would no longer be able to maintain. Paid volunteers are compensated on a per-job or monthly fee basis constituting a nominal stipend for the work done. Many States and Cities pay paid volunteers a wage sufficient only to make these employees eligible for workmen's compensation under State laws. This practice is most prevalent in police and fire protection services. Under Defendant's proposed Regulations for police and fire personnel, § 553.10, intended to be effective January 1, 1975, any stipend beyond reimbursement of out-of-pocket expenses, and other limited exceptions destroys the volunteer status and subjects the policeman or fireman to the Act. This will seriously curtail service now provided by the numerous small, independent volunteer fire departments across the country. The practice of paid volunteers is similarly employed, and will result in similar added expense or diminution of service in areas such as poll workers in elections, and parks, recreation and government projects for involvement of the young, elderly and disadvantaged in the community.

33. In programs developed by experience for the most efficient fulfilling of responsibilities to their citizens and others within their territory, Plaintiffs have implemented the use of joint employment, which under the 1974

Amendments to the Act, Plaintiffs would no longer be able to maintain. Joint employment is the employment of personnel in more than one capacity within the State and City Government, whereby many full-time workers augment their income by part-time jobs in other areas of Government employment. Under Defendant's proposed Regulations for police and fire personnel, § 553.8, intended to be effective January 1, 1975, if the part-time employment involves activities other than police and fire protection, it is possible to lose the exemption provided in § 7(k) of the Act, subjecting police and firefighters to the 40 hour week required by § 7(a). In areas other than police and fire protection, all hours worked for the State or political subdivision, regardless of which agency or department, must be counted towards the hours worked for that week. The requirement of the Act to pay overtime rates for part-time jointly employed personnel will force the end of this practice, which has been beneficial to employer and employee alike.

34. In programs developed by experience for the most efficient fulfilling of responsibilities to their citizens and others within their territory, Plaintiffs have implemented the use of mutual aid police and fire agreements, which under the 1974 Amendments to the Act, Plaintiffs will no longer be able to maintain. Mutual aid agreements allow the pooling of police or fire protection during emergencies or disasters which by their immediacy and gravity are too large for a single agency to combat. The participating agencies generally do not charge for the aid rendered during such emergencies and disasters. However, under Defendant's proposed Regulations for police and

fire personnel, § 553.9, intended to be effective January 1, 1975, all hours worked in aid of other jurisdictions must be counted towards hours worked in the home jurisdiction. This requirement forces the choice between abandoning these agreements, or massive unexpected overtime expenses whenever an emergency situation arises. These overtime expenses, by reason of their unpredictability, present a massive hidden liability which could itself bankrupt smaller political subdivisions.

35. In many other programs developed by experience for the most efficient fulfilling of responsibilities to their citizens and others within their territory, Plaintiffs have implemented the use of employment policies other than those described in the foregoing paragraphs which under the 1974 Amendments to the Act, Plaintiffs would no longer be able to maintain.

36. The Fair Labor Standards Act was enacted in 1938 and has been amended in 1940, 1949, 1955, 1956, 1961, 1963, 1965, 1966, 1972 and 1974. Under the original Act and under amendments prior to the 1966 Amendments, Plaintiffs States and Cities were specifically and unqualifiedly exempted from the Act. The 1974 Amendments, 88 Stat. 55, in express terms include Plaintiffs under the definition of "public agency".

37. The 1974 Amendments to the Act, subject Plaintiff States and Cities to hundreds of rules, Regulations and interpretations allegedly implementing the Act (29 C.F.R., sections 500-1899) and these rules, Regulations and interpretations are now applicable to the newly covered State and local employees. The most recent proposed addition to this volume of Regulations

are proposed rules pertaining to "Employees of Public Agencies Engaged in Fire Protection or Law Enforcement Activity (Including Security Personnel in Correctional Institutions)", 39 Fed. Reg. 38663-66 (1974).

38. In addition, Plaintiffs are subject to Opinion Letters of the Wage and Hour Division of the Department of Labor, many of which have been issued to date dealing with the extended coverage to State and local employees. Examples are: Opinion Letter No. 1325, stating that full-time student employees of a public library are not eligible under § 14 of the Act for wage payment at 85% of the minimum wage as employees of a retail or service establishment, since a library is engaged in the cultural improvement of a community, "a purpose entirely foreign to the accepted understanding of a 'retail' activity"; Opinion Letter No. 1328, stating that beaches operated by a municipal government are not seasonal industries under § 7(c) of the Act; Opinion Letter No. 1331, reiterating the narrow terms of the exemption for employees in the legislative branch of a State Government, stating that employees can be excluded from the Act's coverage only if outside the civil service laws of the governmental jurisdiction involved, and meeting one of the other requirements under § 3(e)(2)(c)(ii) and stating four criteria, also set out to determine if an employee "is selected by the holder of such an office to be a member of his personal staff" or "is appointed by such an officeholder to serve on a policymaking level" under § 3(e)(2)(c)(ii)(II) and (III) of the Act; Opinion Letter No. 1334, setting requirements counting volunteer time for city projects toward hours worked; Opinion Letter No. 1336, exempting petit and grand jurors from coverage under the Act.

39. If constitutional, the Act conflicts with and replaces, by its hundreds of rules and Regulations, the State constitutional, and statutory provisions governing State and City personnel and civil services. The Act also replaces City Charter and ordinance provisions governing personnel and civil service.

40. The Act changes control of State and City employees from States and Cities to Federal control. For the first time in 200 years the Federal Government is claiming constitutional power to thus take over control of this vital internal Government function of States and Cities. The Federal Government's claim of constitutional power to impose employee age, wage, hour, and other personnel controls upon States and Cities is of such sweeping character as to effectively take over control not only of State and City personnel but of State and City budgets because personnel costs are usually a major item in said budgets. No more vital internal function of government exists for States and Cities than control of their employees and the budget items relating to said employees.

41. Unconstitutional interference with the sovereign governmental functions and internal affairs of Plaintiffs occurs through the claim by Defendant of power under the Act to impose upon Plaintiffs a vast number of Regulations, rules, interpretations and decisions issued by Defendant covering employee relations of Plaintiffs and requiring the making, keeping and preservation by Plaintiffs of vast amounts of specified records for numerous inspections by Defendant's enforcement and administrative officials.

42. The Act, Regulations promulgated thereunder and Opinions construing the Act, place Plaintiffs, and all States, political subdivisions and Cities under a massive burden of numerous Federal officers and employees, and remove ultimate control of State and local Government personnel services from States and localities and place that ultimate control in Defendant in Washington, D.C.

43. The Act and its Regulations are confusing, complicated, inequitable and so vague and incomprehensible as applied to State and City employees as to violate the Due Process Clause of the Fifth Amendment of the Constitution of the United States. Said Act and Regulations do not improve State and City personnel, or the services they render, and in many respects are irreparably damaging as they cause enormous expenses and, at the same time, a lessening of service. Existing State law, City Charter and ordinance provisions have been developed and adopted over the years to meet the unique situation of each State and City; and their laws, Charters and provisions are fair, reasonable and devoid of the problems and damage caused by the Act and the proposed Regulations thereunder.

44. The imposing of the Act's provisions and the implementing thereof by Defendant, and the Federal officers and employees acting under his direction and supervision, in replacement of State and City personnel law and State and City implementing officers and employees casts a vast unreasonable burden upon States and Cities. This damaging burden has no rational relation to commerce among the States and cannot be constitutionally based upon the Commerce Clause of the Constitution of the United States, and is in addition a direct violation of the Tenth Amendment of the Constitution of the United States.

45. The 1974 Amendments to the Act have caused and will cause to Plaintiffs irreparable injury and damage, and will irreparably injure and damage all Cities and States situated similarly to Plaintiffs, as described herein. The 1974 Amendments to the Act will require Plaintiffs, States, political subdivisions and Cities to meet enormously increased costs in providing the same essential Government services provided presently. The ability of Plaintiffs to meet these increased costs, which will not be accompanied by increases in the services provided, is circumscribed by some State constitutional provisions limiting taxes and debts, the purpose of which is to safeguard the fiscal integrity of Plaintiffs States and Cities, for the benefit of the citizens thereof.

46. The 1974 Amendments to the Act will force Plaintiffs to forego planned new Government services, owing to the greatly increased cost of providing current or reduced essential Government services, said increased costs arising out of inflexible provisions of the Act rather than out of increased total costs of salaries for all municipal services.

47. The 1974 Amendments to the Act will make it substantially more difficult for Plaintiffs State and Cities to get and keep qualified employees to provide essential Government services, owing to the Amendments' and Act's effective prohibition of the employment practices such as compensatory time off and joint employment alleged in the Complaint, *supra* which benefit employees of Plaintiffs.

48. The great diversity of State and local Governments makes full computation of the nationwide impact of these Amendments impossible. However, a recently

released International City Management Association (ICMA) study of fire protection services across the country provides a basis for determining the immense impact for that budget alone, which is but a fraction of each City's budget. The estimated 200,000 full-time paid firefighters constitute a conservatively estimated payroll of $2 billion annually. The extensive ICMA study indicates that there are three main groups of fire departments which will incur the most liability as a result of the Act: (1) those with an average number of hours per week greater than the 60 hours per week presently required (about 15% of the Cities sampled), (2) those with more than 28 days in their work periods (about 10% of those sampled), and (3) those who employ a pay back system whereby a fireman is paid for more hours than he works in each period but must pay back a certain number of shifts in a year (about 10% of those sampled). Allowing for overlap between these groups and calculating the average increase from the data gathered, the minimum impact for the first year on fire personnel budgets nationwide is estimated at a minimum of $200,000,000. By 1978 the estimated cumulative impact on fire personnel budgets is estimated to be $1 billion. This represents a 50% increase in fire protection costs after three years owing to the 1974 Amendments alone. Increased costs for other essential State and City governmental functions are reasonably certain to amount to billions of dollars per year due to the impact of these 1974 Amendments to the Act.

49. Plaintiff Metropolitan Government of Nashville and Davidson County has concluded that the 1974 Amendments to the Act will increase the cost of

providing only essential police and fire protection, with no increase in service provided, and no increase in salary levels, by $938,000 per year.

50. Furthermore, Plaintiff Metropolitan Government of Nashville and Davidson County, Tennessee, estimates that about 40% of its policemen work in joint employment relationships for the State and Metropolitan Government, as defined in Defendant's new proposed Regulations for police and fire personnel (§ 553.8, intended to be effective on January 1, 1975). These police officers average at least 16 hours a week in this employment. If the proposed rules become effective it is possible that the Metropolitan Government would have to pay overtime on this 16 hours a week, resulting in an overtime payment of $19,000 per week or a total of approximately $1 million per year. The alternative to this added liability is to curtail necessary services.

51. Plaintiff Lompoc, California, will suffer vast as yet inestimable increased costs if it were to comply with the Act with no increase in salary levels and no increase in services provided.

52. Plaintiff Cape Girardeau, Missouri, estimates the present annual fire department budget of $350,000 would have to be increased by another $250,000 to $400,000 per year in order to comply with the Act. This would translate as an increase from the present expenditure rate of 50 cents per $100 assessed valuation to 90 cents per $100 assessed valuation. The citizens of Cape Girardeau cannot comply with such a drastic immediate increase in the cost of their Government.

53. Plaintiff City of Salt Lake will suffer the following irreparable injury as a result of the 1974 Amendments:

the payment of time and one-half instead of compensatory time off for the more than 7000 overtime hours accumulated annually merely to provide necessary snow removal services; discontinuance of shift trading, and flexible scheduling practices; increased costs for the hiring of, or elimination of students to work in the public parks each summer; increased costs for the hiring of, or elimination of student interns from the University of Utah; an estimated $500,000 in additional overtime costs and a diminution of some Government services to meet even this conservative estimate; and enormous morale problems.

54. Plaintiff State of California estimates that for the ensuing Fiscal Year 1975-1976, the Act will require an increase in the cost of providing essential State services among the various departments of the State of California, respectively, as follows:

Department of Justice	$459,688
Department of Food and Agriculture	$654,567
Department of Parks and Recreation	$46,000
Department of Consumer Affairs	$56,000
Department of Transportation	$2,000,000
Department of California Highway Patrol	$432,000
Department of Motor Vehicles	$350,000
Department of Corrections	$80,000
Department of Conservation	$4,000,000 – $12,000,000
TOTAL – ALL DEPARTMENTS	$8,168,255 – $16,168,255

The foregoing estimate does *not* include an estimation of the State's administrative expense for meeting the record-keeping requirements of the Act, *nor* does such estimate include approximately 6 million dollars in additional costs to the State by reason of the fiscal inability of city and county fire departments, who are participants in the California mutual aid program, to meet the overtime requirements of the federal Act. Also *not* included in such estimate is tremendous overtime costs (amounting to approximately $750,000 per year) which are required to be paid to California Highway Patrol cadets during their academy training program; the California Highway Patrol has been forced to reduce its training program from 2,080 hours to 960 hours to obviate the application of the federal Act, all to the detriment of the academy training program, a program crucial to the safety and welfare of the People of the State of California.

55. Plaintiff Arizona estimates that for fiscal year 1975-76, the Act will require a $1.5 million increase in the cost of providing State police services, a $200,000 increase in the cost of providing State health services and a $300,000 increase in costs of highway services. This, coupled with additional employee related costs of $300,000, and $250,000 extra needed in highway construction costs, brings the estimated total impact of the Act for one year to over $2.5 million dollars for the State of Arizona alone.

56. Member Cities of Plaintiff National League of Cities, in planning their budgets for upcoming years, have reported to Plaintiff National League of Cities many other illustrations of the irreparable injury they will

suffer as a result of the Act with special damaging impact on such cities who up to now have depended on much volunteer public service. Examples are here set out in paragraphs 57 and 77.

57. Owing to the burdensome requirements of the 1974 Amendments, the City of Los Angeles, California, (pop. 2,816,061) estimates an additional expense for fiscal year 1975-76 in the budget for salaries of fire personnel only, of over $2.5 million, plus an increase in pension costs of between $160,000 and $430,000. This increased cost is the result of time and one-half payment for overtime and hiring of additional uniformed personnel with no increase in service. If in 1978, police workweeks are brought into parity with other employees under the Act, the estimated overtime costs for that department alone would be between $4 and 6 million. These estimates presume the continuance of present salary levels and take into account no future increases in services provided.

58. Owing to the burdensome requirements of the 1974 Amendments, the Sacramento, California, (pop. 254,413) budget for the current fiscal year 1974-75 has already incurred an extra $350,000 cost due merely to non-police and fire services. Also, the City's carefully developed system of compensatory time off, favored by management and employees alike, must now be abolished as illegal under the Amendments. In the area of fire protection services, a new Memorandum of Understanding will be negotiated between fire personnel and the City for fiscal year 1975-76. The uncertainty presented by the diminishing exemption under § 7(k) of the Act renders these negotiations nearly impossible. By

January 1, 1977, in order to merely meet the Act's requirements in fire protection services, the City must either diminish services or hire 16-17 additional fire-fighters at a cost of $310,000 in 1974 firemen wages. If in 1978, the Secretary of Labor study (upon which, under the Act, work weeks will be based) should result in a 52 hour work week, Sacramento's additional cost for present firefighting service would increase $636,000; if a 50 hour week is established, $993,000; if a 48 hour week is established, $1,379,000. Furthermore, conflict between the proposed Regulations for fire and police protection service and the already existing volume of Regulations (29 C.F.R. §§ 500-1899) create uncertainties as to who is and who is not covered under the Act.

59. Owing to the burdensome requirements of the 1974 Amendments, Pasadena, California (pop. 113,327) estimates that in 1978 when the present police and fire personnel exemption could be expected to be in parity with the present requirement for others covered under the Act, the same level of fire protection service at the same wage rate would cost an additional $1.5 million dollars, representing a 50% increase over the current budget for such activities of $3 million.

60. Owing to the burdensome requirements of the 1974 Amendments the City of San Buenaventura, California, (pop. 47,089) estimates its overtime costs for fire personnel to be $72,700 in 1975, $63,200 in 1976, $126,500 in 1977 and $31,600 for each additional hour the work week is decreased by the 1978 survey. These increased costs represent an increase payroll cost by the end of 1977 of 29.1%.

61. Owing to the burdensome requirements of the 1974 Amendments, in Newark, California, (pop. 27,153) an immediate impact of nearly $18,000 will be incurred just to meet the Act's new requirements for overtime for outside training, shift change, manning, call back and staff meetings. The costs of overtime and additional personnel to meet the Act's new hour requirements would range from $24,000 in 1977 to approximately $183,000 in 1978.

62. Owing to the burdensome requirements of the 1974 Amendments, Montebello, California (pop. 42,807) estimates its overall additional overtime costs to be $140,000 per year. In fire suppression service alone it expects a 27.3% increase in overtime costs for 1975 with an estimated combined regular salary and overtime cost increase of $117,922 by the impact date of 1977. Its police department will be affected in that "Reserve" officers who previously worked on a call and emergency basis for a stipend of $25.00 per month, now may not work in excess of 12 and 1/2 hours a month. This program, therefore, has been effectively abolished.

63. Owing to the burdensome requirements of the 1974 Amendments, Menlo Park, California, (pop. 26,734) in order to prevent diminution of services in the areas of crime prevention, traffic enforcement, case investigation and emergency incident response must spend an additional $120,000 annually.

64. Owing to the burdensome requirements of the 1974 Amendments, in Inglewood, California, (pop. 87,985) the police department must curtail its effort to achieve affirmative action goals by providing employment opportunities for men and women interested in a career

in law enforcement. Under the contractual arrangement trainees worked 20 hours per week at $3.57 per hour and books and tuition were provided free for the 20 hours per week of classes. Unable to meet the stricter financial burden placed on this program by the Act the City has been forced to abolish it.

65. Owing to the burdensome requirements of the 1974 Amendments, Clovis, California, (pop. 13,856) must make a decision regarding its internship programs with California State University in Fresno to give students the opportunity to observe and participate, to a limited extent, in daily government operation. Students received as compensation, school credit and a small stipend. The Fair Labor Standards Act will cause the City to eliminate the program or the pay for interns. Some students will have to be excluded from the program either way.

66. Owing to the burdensome requirements of the 1974 Amendments, Coronado, California, (pop. 20,910) estimates additional overtime costs in its fire department alone of over $33,000 for 1975, over $59,000 for 1976 and over $111,000 for 1977.

67. Owing to the burdensome requirements of the 1974 Amendments, Sumter, South Carolina, (pop. 23,895) estimates its overall additional overtime expense and wage increase will amount to $235,000 per year. In addition, the City of Sumter will have to terminate part-time firefighters who also work in other City departments.

68. Owing to the burdensome requirements of the 1974 Amendments in Lodi, California, (pop. 28,691) the necessity that the work period be seven days rather than

the previous practice of one month means extra costs in the computation of payrolls which Lodi must do mechanically, there not being the benefit of a computer available to the City.

69. Owing to the burdensome requirements of the 1974 Amendments, Downey, California, (pop. 88,445) has been forced to abandon an effective proposal for twelve-hour police dispatcher shifts since the scheduling would have resulted in employees working less than 40 hours in some weeks while more than 40 hours in others with overtime costs incurred.

70. Owing to the burdensome requirements of the 1974 Amendments, in Randolph, New Jersey, some full-time employees no longer may serve as staff for volunteer boards or commissions. Since all of these hours must be counted towards "hours worked" under the Act, this practice, helpful to the municipality and commission, must be discontinued and paid staff hired, increasing the cost to the City.

71. Owing to the burdensome requirements of the 1974 Amendments, Phoenix, Arizona, (pop. 581,562) estimates that the elimination of "compensatory time" will result in an additional annual increased expenditure of $100,000.

72. Owing to the burdensome requirements of the 1974 Amendments, Tulsa, Oklahoma, (pop. 331,638) estimates additional costs in its fire department at $126,700 for 1976 and $380,600 additional cost in 1977.

73. Owing to the burdensome requirements of the 1974 Amendments, Sunnyvale, California, (pop. 75,408) estimates that additional costs for its public safety

personnel overtime will be $169,000 for 1975, $186,000 for 1976 and over $204,000 for 1977.

74. Owing to the burdensome requirements of the 1974 Amendments, Corcoran, California, (pop. 5,249) estimates a $49,000 per year increase to all city functions and that it must reduce training time and ambulance services.

75. Owing to the burdensome requirements of the 1974 Amendments, Columbia, South Carolina, (pop. 113,542) estimates that by 1976 its fire protection salary budget will have to be increased by $110,000 in order to merely continue the service presently provided. Furthermore, since under the proposed Regulation (§ 553.6 intended to be affective on January 1, 1975) all job related training is compensable, and since training programs are difficult to arrange during scheduled work hours for these departments, decreased in-service training is a likely result. Such decrease is just as damaging in the long run, and mitigates efficiency of police and fire services just as much, as an outright decrease in service.

76. Owing to the burdensome requirements of the 1974 Amendments, Richmond, Virginia (pop. 249,621) estimates that the hiring of necessary additional firefighters in order to maintain present services and still be in compliance with the Act will cost the City an additional $161,000.

77. Owing to the burdensome requirements of the 1974 Amendments, Reidsville, North Carolina (pop. 13,636) estimates increased police protection costs of $33,567 next year representing an increase of over 10% of the total annual police salary expenditure, and increased fire protection costs of $30,635 next year

representing an increase of over 15% of the total annual fire salary expenditures.

78. In meeting the increase cost of providing the same essential government services currently provided, which increased cost the 1974 Amendments to the Act impose on Plaintiff Metropolitan Government of Nashville and Davidson County, it is limited by Article II, section 9 of the Constitution of Tennessee, which prohibits municipal income, estate and inheritance taxes.

79. In meeting the increased cost of providing the same essential Government services as currently provided, which increased cost the 1974 Amendments to the Act impose on Plaintiff Arizona, Plaintiff Arizona is limited by Article 9, section 5 of the Constitution of Arizona, which limits State debt. Political subdivisions of Plaintiff Arizona are limited by Article 9, section 8 of the Constitution of Arizona to a debt of four per centum of taxable property without a special election and, in any case, ten per centum of taxable property.

80. In meeting the increased cost of providing the same essential Government services, as currently provided, which increased cost the 1974 Amendments to the Act impose on Plaintiff Lompoc, Plaintiff Lompoc is limited by Article XIII, section 40 of the Constitution of California, which prohibits a City or other municipal corporation from incurring debts in excess of revenue for the current year without a special election.

81. In meeting the increased cost of providing the same essential Government services as currently provided, which increased cost the 1974 Amendments to the Act impose on Plaintiff Salt Lake City, Plaintiff Salt Lake City is limited by Article XIV, section 3 of the

Constitution of Utah, which provides that cities and other municipal corporations may not incur debts in excess of taxes for the current year. Article XIV, section 4 of the Constitution of Utah prohibits taxation by cities and other municipal corporations in excess of four per centum of the value of taxable property.

82. In meeting the increased cost of providing the same essential Government services as currently provided, which increased cost the 1974 Amendments to the Act impose on Plaintiff Cape Girardeau, Plaintiff Cape Girardeau is limited by Article 6, section 26 of the Constitution of 1945 of Missouri, which prohibits Cities and political subdivisions of the State from incurring debts in excess of revenues for the current year, without a special election. Article 6, section 26(b) of the Constitution of 1945 of Missouri limits the excess of debt over revenue to five per centum of the value of taxable tangible property, even following such a special election.

83. Plaintiffs State, political subdivisions and Cities are and will be required by the 1974 Amendments to the Act to alter work schedules and other personnel policies of long standing and proven effectiveness, for no reasonable reason related to the effective provision of essential Government services to the people within Plaintiffs' jurisdictions. The only purpose to Plaintiffs for this alteration of schedules and policies is to minimize the overtime wages provided for under the Act as amended, so as to keep within budget law requirements.

84. Plaintiffs are further irreparably and immediately harmed in that § 16 of the Act imposes a $10,000 fine plus up to six months in prison for willful violations. Furthermore, any violation of § 6 or § 7 of the Act

results in a Civil liability of back pay plus an equal amount in liquidated damages. Thus, literally, each hour of the Act's application to Plaintiffs results in the potential of double damages in a suit under the Act.

85. The facts set forth herein demonstrate the irreparable harm imposed upon Plaintiffs for which Plaintiffs have no adequate remedy at law; Plaintiffs are entitled to a Judgment adjudicating their rights and an injunction to prevent Defendant from enforcing this unconstitutional Act against Plaintiffs.

WHEREFORE, Plaintiffs demand judgment against Defendant, declaring the Fair Labor Standards Act as applied to States, Cities and political subdivisions of States to be unconstitutional and for the interlocutory, preliminary and permanent enjoining of Defendant from enforcing or attempting to enforce the Act against Plaintiffs or those situated similarly to Plaintiffs, and for such other and additional relief as the facts alleged herein may warrant.

DATED: December 23, 1974.

Respectfully submitted,
EVELLE J. YOUNGER, Attorney General
of the State of California
WILLARD A. SHANK
Assistant Attorney General
TALMADGE R. JONES
Deputy Attorney General

By/s/ TALMADGE R. JONES
TALMADGE R. JONES
Attorneys for Plaintiffs-Intervenors

STATE OF CALIFORNIA)
:
COUNTY OF SACRAMENTO)

JACK WOODARD, being duly sworn, deposes and says that his business address is the Agriculture and Services Agency of the State of California, 1220 N Street, Sacramento, California 95814; that he is Acting Secretary of the Agriculture and Services Agency of the State of California, plaintiff herein; and that he has read the foregoing Complaint in Intervention, knows the contents thereof with respect to the State of California and its named officers, and that the same are true of his own knowledge.

/s/ JACK WOODARD
JACK WOODARD

Subscribed and sworn to before me
this 24th day of December, 1974.

/s/ Billie R. Huntley
NOTARY PUBLIC

Transcript of Deposition of Allen E. Pritchard, Jr., December 23, 1974

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NATIONAL LEAGUE OF CITIES, et al.,	)	
Plaintiffs,	)	
	)	Civil Action
vs.	)	No. 74-1812
	)	
HONORABLE PETER J. BRENNAN, Secretary of Labor,	)	
Defendant.	)	

DEPOSITION OF ALLEN PRITCHARD, JR.

Washington, D. C.
Monday, 23 December 1974

Deposition of ALLEN PRITCHARD, JR., called for examination by agreement of counsel, at Room 4121, Labor Department, 14th and Constitution Avenue, N. W., Washington, D. C., at 10 a.m., before Dennis A. Dinkel, a notary public in and for the District of Columbia, when were present on behalf of the respective parties:

CHARLES S. RHYNE, WILLIAM RHYNE, and RICK BACIGALUPO, Esqs.; on behalf of Plaintiffs.

NATHAN DODELL, Esq.; Assistant United States Attorney; on behalf of Defendant.

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EXHIBITS

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Defendant's:	
1	14
2	15
3	28
4	38
5	51
6, 7, 8 and 9	55
10 thru 36	60
37	125
Plaintiff's:	
1	234

[4] Whereupon,

ALLEN PRITCHARD, JR.

was called as a witness and, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. DODELL:

Q State your name.

A Allen E. Pritchard, Jr.

Q Your address?

A My office address?

Q Yes.

A 1620 I Street Northwest, Washington, D.C.

Q What is your position?

A I am the executive vice president of the National League of Cities.

Q And how long have you held that position?

A Position of executive vice president since July of 1972.

Q And prior to that, what was your position?

A I was deputy executive vice president.

Q When did you assume that responsibility?

A 1970.

Q [5] And prior to that, where were you employed?

A I was director of Congressional relations for the National League of Cities since 1966.

Q And prior to that?

A I was for one year the director of the Joint Center for Community Development of the National League of Cities and the United States Conference of Mayors.

Q That was for one year?

A Yes. I organized that.

Q And prior to that?

A I was administrative assistant to Senator James B. Pearson of Kansas, United States Senator, for three and a half years.

Q So that was from –

A From 19 – about April of 1962, as I recall.

MR. CHARLES RHYNE: If it would help you, I have a biographical sketch. Do you want that?

MR. DODELL: That would be helpful.

Thank you, Mr. Rhyne.

BY MR. DODELL:

Q Mr. Pritchard, in the verified complaint, there are a number of allegations made about the impact of the Fair [6] Labor Standards Amendments of 1974 on various cities. I would like to ask you some questions about those allegations.

I would like to start with the city of Nashville; and it is referred to in the complaint as the metropolitan government of Nashville and Davidson County.

I would like to ask you whether Nashville has come into compliance with the amendments with regard to those provisions that were effective May 1, 1974?

A I am not certain that I can answer that they have come into complete compliance. The information that I have as far as Nashville or any other city is concerned, except for those who have indicated an exception as in the case of Cape Girardeau, the cities, the city officials have done their best to comply with what information they have.

I think one of our great concerns is that the lack of information, the lack of understanding, the inability to interpret Title 29 raises great doubts as to whether many of them have complied or are able to comply at this time.

Q So if I understand what you have said –

A I think there is a difference between intent and [7] my ability to swear that they have in all ways come into compliance.

Q Is it – am I correct, then, in understanding what you have said that as far as you know, with the exception of Cape Girardeau, the cities have tried to comply with the act as they understand it?

A I think – yes, it is a general practice of locally elected officials to comply with the law, even though they don't like it.

Q And do you know how much it has cost Nashville to try to come into compliance with those provisions of the act which became effective May 1, 1974?

A I think those figures are in the complaint. Those were figures that were supplied by the city of Nashville. Without detailed papers in front of me, I couldn't recite the details on 15,000 cities; but the data that we have supplied is data that has been supplied us by those cities in their efforts to comply or – what they anticipate will be required to comply.

Q Well, as I read the complaint with regard to Nashville, the only allegations are with regard to police and fire protection; and I don't see any allegations with [8] regard to the cost of complying with the other provisions of the act that became effective May 1, 1974, other than provisions regarding police and firemen. Can we then assume that you are not making any allegation that Nashville has had any extra expense for those other employees?

A I think that the *Congressional Record* indicated that under the – in discussing this legislation that most of the

cities already met the minimum wage standards in most areas.

In fact, there was an indication that the law would have no impact because of that. Our information indicates that most cities do pay the minimum wage, so that as far as – and that has been the big factor in the application that came into effect May 1. There will be an impact in those areas which, under the May 1 application which many of the cities have not completely sorted out yet; and I assume this is also true in the case of Nashville.

In the case of its application to boards and commissions, for example, we still don't understand how that applies and what impact that is going to have. As far as the day-to-day employees in many jurisdictions, the minimum wage did not have an impact.

Q [9] And putting aside for the moment policemen and firemen, since May 1, Nashville has had to pay overtime to employees who have exceeded 40 hours per week; is that correct?

A That's right; and again in Nashville as in many other jurisdictions, as you note – and we can supply data, provisions were made in those cities already for time and a half under local law.

Q Prior to that time?

A That's right.

Q So that provision did not have an impact on Nashville?

A I am not saying it didn't have impact. I don't think the impact has been fully sorted out at this point.

As I indicated, in some areas there are two kinds of impacts that haven't been sorted out that I can identify quickly.

One is that there's a failure to recognize that local government operates much differently than a private business, and much differently than the federal government. A substantial amount of the activity carried on by local government is carried on by lay people who are only [10] nominally compensated. These people serve on planning commissions, zoning boards, hospital boards, all kinds of boards and commissions, library boards, and are only compensated at nominal rates.

There are many other types of semi-volunteer type activities; and how that – these people in their certifications did not understand and do not now understand how that is going to be interpreted.

We have many, many cities that have police – have police reserves, for example, who don't – still don't understand and will not be able to understand the police and fire regulations, the public safety regulations, what the impact of this is going to be.

It is going to be months and months before those things can be sorted out.

There is an impact there.

The other impact which they have not – cannot sort out at this point, which is very critical, is that once these changes are made, they change the whole structure of local salary – the whole local salary structure, the pay schedules, all the way through the system; and what the ripple effect of this is going to be is something that [11] I am sure in terms of an immediate measure at the point in time in which these statements were made had not had an opportunity to be sorted out.

Q Insofar as Nashville is concerned, I think you have said that since May 1, 1974, there's been no substantial

impact on the ordinary, day-to-day employee because Nashville met the minimum wage?

MR. CHARLES RHYNE: I don't think he said that at all. That's your interpretation of what he said. He said there is a ripple effect and an effect they don't realize because of all these other things. You are asking him very general questions. I don't want him to misinterpret your interpretation of his question.

MR. DODELL: I will ask the question again then.

BY MR. DODELL:

Q Since May 1, 1974, you have said that Nashville has tried to come into compliance with the act as well as it can interpret it with regard to its day-to-day employees.

With regard to its day-to-day employees, has there been a substantial impact on Nashville financially in coming – in trying to come into compliance with the provisions that became effective May 1, 1974?

A [12] As far as I can determine at this point, and as far as they can determine, the application on May 1 did not have a substantial impact; but that's as far as they can determine at this point.

Q Now with regard to the figure of 938,000, that is in paragraph 45 of the complaint – and I would like to read you that paragraph.

MR. CHARLES RHYNE: Do you want him to look at it?

MR. DODELL: Do you have a copy?

THE WITNESS: Yes.

MR. DODELL: Thank you for that suggestion, Mr. Rhyne.

MR. CHARLES RHYNE: Which one?

MR. DODELL: Paragraph 45.

BY MR. DODELL:

Q Could you read to yourself paragraph 45?

A Yes. Yes.

Q Now let me ask you first, when that says $938,000 per year, do you know whether that refers to 1975?

A Yes, that does apply to 1975. The increase would be greater in subsequent years.

Q [13] Now do you know how that figure was computed by the city of Nashville?

A It was computed on the basis of the information that they had available from the advance materials supplied by the Wage and Hour Division.

Q Now do you know how much of that is attributable to the provisions with regard to policemen and how much with regard to the provisions regarding firemen?

A My recollection is, without having their statement in front of me, is that that is entirely attributable to that.

Q Yes, but how much is attributable to police and how much is attributable to firemen?

A I believe that most of it, if not all of it, is attributable to fire at this point.

MR. CHARLES RHYNE: Do you want the piece of paper he's referring to? I don't mean to interfere with your thing, but he obviously is referring to some piece of paper.

If you want that, you can have it.

MR. DODELL: That would be excellent, Mr. Rhyne, if there is such a piece of paper. I would be delighted to [14] see it.

MR. CHARLES RHYNE: Rick, do you have the piece of paper that relates to this?

MR. DODELL: Thank you, Mr. Rhyne.

May we have this?

MR. CHARLES RHYNE: Yes.

MR. DODELL: Could we mark this Defendant's Exhibit No. 1 for identification?

(The document referred to was marked Defendant's Exhibit 1 for identification.)

MR. CHARLES RHYNE: I find there are two pieces of paper.

MR. BACIGALUPO: The next relates to the next paragraph.

MR. CHARLES RHYNE: Well, are they both marked Exhibit A?

MR. WILLIAM RHYNE: The next piece of paper relates to the next paragraph.

MR. CHARLES RHYNE: All right. I am sorry.

MR. DODELL: Could you mark these as plaintiff's exhibits – excuse me, Defendant's Exhibits 1 and 2 for [15] identification?

(The document referred to was marked Defendant's Exhibit 2 for identification.)

BY MR. DODELL:

Q I would like to show you the exhibits marked Defendant's Exhibits No. 1 and 2 for identification.

A I have copies.

Q May I ask, is your knowledge with regard to paragraphs – let me take one at a time.

With regard to paragraph 45, entirely based on Defendant's Exhibit 41 – Nos. 1 and 2 that have been marked for identification?

A That's correct.

Q So for the record then – I think this is implicit in your answer, you don't know how many average hours

per week policemen in Nashville or firemen in Nashville were on duty in 1974?

A No. No, I don't.

Q With regard to paragraph 46 of the complaint it is correct, is it not, that if policemen averaged 44 hours per week for Nashville, and they averaged 16 hours [16] per week for the state government in a police function, then they would not exceed the 60 hour per week figure that is provided for under the amendments and provided that the work period was set up under the act, there would be no additional overtime obligation? Is that correct?

A I don't agree with several parts of your point there. I don't know where you get the 44 hours to begin with; and the 60 hours – to my understanding – does not apply in the situation in which – which is described here. This is joint employment as described in here, which is governed by entirely different sections of the regulations.

Q It is your understanding that if the – if there is a joint employment relationship, and if the policeman works in a police capacity for the state government, and also in a police capacity for the metropolitan government, that the 60-hour provision is not applicable?

A My understanding is that – and you get into very minute details of regulations that have just come out – but my understanding is that the joint employment is covered by another section; and that the – in this case, the 40 hours applies.

Q But –

A [17] 60 hours only applies to firemen, I believe. Not to policemen.

Q This depends in any event upon a reading of the regulations, not on the statute itself?

A No. It applies – the hours set in the statute for firemen and policemen are different.

Q Doesn't the statute provide 60 hours – an aggregate of 240 hours for both policemen and firemen?

A Well, I should check that to verify that. Nevertheless, the joint employment agreement is a different section of the statute.

MR. CHARLES RHYNE: I should add, Mr. Pritchard is not a lawyer, and I think you will understand that he may have difficulty in interpreting the law and the regulations.

THE WITNESS: I should say that the information supplied here is based upon the cities – and as you can see, the city attorney having worked with his city, the director of law, interpretation of the regulations and the law.

BY MR. DODELL:

Q Well, there were no final regulations until [18] last Friday, is that not correct?

A That's right, but in those particular provisions they were not significantly changed, as I understand it.

Q Now do you know whether Nashville has already prepared its budget for the year 1975?

A My understanding is that the city of Nashville is on a July 1 budget year, and is currently in their budget year. The new budget will be under consideration for enactment on July 1.

Q So Nashville is presently under a budget that would encompass the next six months?

A That's right.

Q Do you know whether that budget has been premised on the coming into effect of the amendments

on January 1st or not?

A No, it was not, because the information was not available at that time.

Q Well, the statute was available, was it not, Mr. Pritchard?

A The statute was available, but there was no basis for determining how – for example, the biggest problem in police and fire at this point, particularly on [19] fire where the big cost is, was that there was an assumption based upon the general interpretation of legislative history that sleep and eating time would be exempted.

That makes a very substantial difference in the cost. There was no way for anyone to determine that at that point.

That's true of virtually every city that operates under the July 1 budget year.

Q If I understand you then, Nashville's budget is not geared to the new amendments commencing January 1st?

A Not – there may have been some accommodation, but not entirely.

Q Well, your previous testimony was that the cities tried to comply with the law. What was Nashville's anticipation as to how it would comply with the law starting January 1st, if it didn't construct its budget such that it could –

A I don't know –

Q Excuse me. Could I finish the question?

– such that it could finance compliance?

A I don't pretend to be able to read the minds of the city officials of Nashville. It is my job to rely on [20] their information supplied to me. I represent them in that capacity as I do the other 15,000 cities; and I gather the

information and present it to whoever it is appropriate to present it to, based upon their certification of what their interpretation is, and what their – what the impact is. I am in no position to read the minds of the mayor, the city council. I can only give you the facts as to what they produce.

Q Just so I understand – I am not sure I understood your testimony as to whether or not the budget for the next six months provides for the compliance with the new amendments or not?

A It is my understanding that I said that it did not. No one in – on July, when this act was signed in April – and there were no regulations available at that point, no one was in a position to draw any budgets with full understanding of what the implications would be budgetwise.

I would doubt that there would be 10 percent of the municipalities in the country that have budgets – of those that adopted budgets in July, made any provision for the – I have no factual data to back that up. That [21] would be my experienced judgment that not more than 10 percent of those jurisdictions were able to modify their budgets to accommodate this provision.

They did not know at that point how it would apply. We certainly would not have been able to advise them. I doubt this department would. Even at this point, this department is still advising municipalities that there are interpretations which they are not prepared to provide.

Certainly on July 1, they were not prepared to provide it.

MR. CHARLES RHYNE: You mean July 1, 1974?

THE WITNESS: Yes.

BY MR. DODELL:

Q Do you have any information other than your experienced judgment as to how many cities have drawn up their budgets in order to accommodate the amendments that are effective January 1, 1975?

MR. CHARLES RHYNE: Which budget and when? I think we may have a confused record. Some cities have budgets July 1; some January 1. So –

THE WITNESS: And some October 1; some April 1. [22] They are all in various stages of development.

BY MR. DODELL:

Q Let's take one at a time.

If there are cities – let's take cities that have a budget that began July 1, 1974, and ends on July 1 – or June 30, 1975. I think you said your experienced judgment would be that not more than 10 percent of those cities have drawn up budgets to accommodate the amendments that come into effect on January 1, 1975.

Do you have any facts other than your experienced judgment to back up that estimate?

MR. CHARLES RHYNE: Wait a minute. You have two questions in one. Your first question relates to cities that adopted a budget that went into effect on July 1, 1974.

Your second question, as I understood your question, relates to budgets that go into effect on June 30, 1975?

MR. DODELL: That's not correct, Mr. Rhyne.

Could you read back the question, please?

MR. CHARLES RHYNE: I am sorry.

MR. DODELL: Did you understand the question?

[23] THE WITNESS: I believe what you are trying to get at is what – do I have any data that supports the

statement of approximately 10 percent of the cities who adopted budgets on July 1 for the period July 1, 1974, to July 1, 1975, whether or not those cities have complied – have put into the budgets provisions to comply with the act, and particularly that part going into effect on January 1, 1975?

I would say I do not have specific data on 15,000 cities. That's my experienced judgment of watching and working with cities for 28 years, that on the basis of the amount of information available, when it was available, the lead time it takes to adopt a budget on July 1, because those budgets begin preparation back in April and May, and they go through public hearings, and after they have gone through public hearings, major changes cannot be made, that the lead time was such that it was impossible.

It was not a matter of intent. It was a matter of practical impossibility to anticipate and to include in the July 1 adopted budgets provisions to accommodate this act.

[24] BY MR. DODELL:

Q Then I think you said some cities have budgets that begin October 1, 1974, and end presumably September 30?

A Some in October, some in January.

Q As to the cities that have budgets beginning in October, do you have a percentage estimate as to your experienced judgment as to how many cities incorporated provisions in their budget to accommodate the amendments that would go into effect on January 1?

A I would say from my experience that the vast majority of them on the October budgets – and I would

say the same thing for the January budgets, have not provided for the impact of the January 1 change.

This is because all of the information that they have been supplied by the Department of Labor, by the regional offices, by other interest groups that have been trying to keep them informed, has had to advise them that all information is tentative, and that they ought to be very careful as to how they proceed until the regulations were final; and the regulations were not published in the register until December 20.

So budgets that are adopted even on January 1 – [25] effective January 1 in some jurisdictions had to be finalized in October or November because they had to – for example, in some states, in Ohio, the tax – the budgets that go into effect on January 1 are based upon a tax levy developed on a preliminary estimate that had to be made on October 15; and they cannot then adopt a budget which exceeds their tax levy.

So you are dealing with a practical time schedule which in terms of the pace at which these regulations were developed and made known made it practically impossible for jurisdictions to accommodate.

Now, for those jurisdictions who adopt budgets in April of next year, or July of next year, obviously there is time – advance notice which they could look at compliance.

But anything prior to January 1, I have very serious doubts that even a majority of them have been able to comply.

Q Well, Mr. Pritchard, is it your understanding that the statute that was adopted April 8th required action by the Labor Department before it imposed an obligation

upon states and local governments?

A [26] Obviously the statute is a statute. There is a legal interpretation. I am not going to try to discuss that. I am not a lawyer. I do know that the very – the range of interpretations of the application of that act, particularly in the field in question that applies January 1, was so broad – and it still leaves a lot of questions unanswered – that many jurisdictions did not think they would have to do anything.

Let me give you an example:

85 percent of the cities that employ full-time firemen operate with less than – operate under 60 hours right now; but well over a majority of them would still have a significant financial impact even though the law says you work less than 60 hours.

We have jurisdictions in New Jersey, for example, that are just now discovering that they have been working what they called a 42-hour week; and they have a financial impact, even though the law says 60.

Now – and, you know, I can go into the reasons for that; but the fact is that until these regulations were available and they began to understand the implications of the work cycle and the inability to deduct mealtime [27] and sleep time, they did not even understand that there was a financial impact, because their understanding and their employees' understanding was they were working less hours than the law required.

The fact is that it does have an impact and a substantial one.

Q Mr. Pritchard, is it your testimony that it wasn't until recently that jurisdictions understood that even if their employees averaged less than 60 hours, there still

could be an impact upon them as a result of the amendments?

A I would point out to you that the regulations that the cities are dealing with, there are 18,000 incorporated municipalities in this country. We work with 15,000 of those. We try to provide them with as much information as we can; but we can't provide it until you provide it in the first place.

We do not put out skeptical reports or – we don't put it out until we know it and we know it is right. That takes time to get it from you; it takes time to interpret it.

From the department's own standpoint, if we were [28] not providing even that much, from your standpoint, from the department's standpoint, the regulations by the department – the Wage and Hour Division's own statement in here, were provided to the governors and to 800 other people; and those included members of Congress, librarians, individuals, and other state and local government officials.

Now if only 800 out of 15,000, or 18,000, were provided the regulations, and the rest of the information had to be gathered from the newspaper for what – to what extent that's reported, how in the world can anybody expect within a matter of seven days for anyone to come in compliance?

I mean that's absurd on its face.

MR. DODELL: I would like to have this document marked Defendant's Exhibit No. 3 for identification.

(The document referred to was marked Defendant's Exhibit No. 3 for identification.)

MR. DODELL: For the record, this is a letter from Carol Kochelson – I am sorry, Kocheisen, counsel Office

of Federal Regulations, to William Hoffman, Wage and [29] Hours Division, Department of Labor, June 14, 1974, on a letterhead, National League of Cities, United States Conference of Mayors.

BY MR. DODELL:

Q Have you seen that before?

A Yes.

Q May I have that for a moment?

A Sure.

Q Now, Mr. Pritchard, doesn't this circular in June of 1974 from the National League of Cities – and it is under the heading Management Information Service – inform those who received it that they should be cautious in drawing up their work periods and tours of duty because of the provisions of the Fair Labor Standards Act Amendments of 1974?

A For those who received it, yes. It provides a certain amount of information. I would call your attention to the last paragraph in which it says, "As the Department of Labor regulations pertaining to overtime will not be issued until the summer of 1974, many answers cannot now be provided to questions of city administrators and fire chiefs may have."

[30] That is the kind of qualifications that everybody has to work under in the first place.

In the second place, I don't know what the distribution of this is. This report is only available to – this is not a report of general distribution. This report is available to those who subscribe to it for $100 a year. We don't distribute this. This is distributed by the International City Management Association, and only to those who subscribe to it at $100 a year.

I am sure they don't sell 15,000 subscriptions. It is probably in the neighborhood of 1000.

Q Your office received it, I take it?

A Yes, we received it. As a matter of fact, we helped put it together.

Q Your office was aware, then, that way back in June that scheduling could have an impact?

A Certainly.

Q Excuse me. Let me finish the question.

Scheduling could have an impact on the overtime liability of cities?

A Yes. You were asking me about what impact this – what effect this had on people who had July 1 [31] budgets; and I am saying to you that a report like this, even if there were no qualifications in it, put out in June, which was probably as early as anything could be provided, since the bill was only signed the first week in April, would not have reached people in time to be analyzed and fed into the preparation of the budgets adopted July 1.

Q Mr. Pritchard, I addressed this to your observation that even though 85 percent of the cities have an average work week of less than 60 hours, it was your testimony that they still could have a liability for overtime; and you said this is because the regulations weren't out, the final regulations, until December 20.

What I am pointing out to you – and I think you confirm it from your testimony – that in this circular in June, which was available to you in June, and which you helped to put together, it was understood that scheduling of work periods and tours of duty could have an impact on overtime liability; and that was six months before the

effective date of January 1, 1975. That's correct, is it not?

A I am also –

MR. CHARLES RHYNE: Wait just a moment.

[32]You are leaving out the major part of his testimony, which was you couldn't tell the impact from this release because no one knew.

MR. DODELL: Are you testifying, Mr. Rhyne?

MR. CHARLES RHYNE: No. But I don't want this witness subjected to unfair questions. I think he ought to understand what you are implying because you keep trying to interpret his testimony.

I just don't want any mistake. I want a clear record.

MR. DODELL: All right. Let's take it again, then, Mr. Pritchard.

BY MR. DODELL:

Q Did not this report indicate to your office as well as to those who read it as early as June of 1974 that scheduling of work periods and tours of duty could have an impact on liability under the amendments that would become effective January 1, 1975? And I think that can be answered yes or no, Mr. Pritchard.

A No, it can't be answered yes or no.

The traditional practice in local government has been to consider a number of hours worked in a week, a [33] work week, for firemen.

Now, if you read all of the literature, including the reports on fire administration produced by the International City Management Association, which is a big, thick training book, and all the other literature, and the testimony before state legislatures where legislatures have dealt with firemen's hours, the testimony has always

been in terms of 60 hours a week, 56 hours a week, 64 hours a week, whatever that is.

The traditional thinking in the local government level has been on the number of hours per week. Now this law comes along and establishes a cycle which in spite of the meetings that we have held and communications that have been provided is not understood because all of the accounting systems, the bookkeeping systems, the payroll systems, the hours scheduling systems have been keyed to a week, not to a cycle, as is provided in here.

The result of this is that it is imposing itself on a traditional system which the vast majority of local government officials simply do not understand, and do not comprehend. When they were told that firemen had to work less than 60 hours a week in order to avoid overtime, and [34] they looked at their traditional negotiations with their firefighters' associations, and – or whatever process they go through, and understood, as under state law, for example, in some states where they work a 10-14 schedule, that they were working less than 60 hours a week, their interpretation in their budgeting process is at that point – it was that they were in compliance.

Now I am saying to you that there is a period in the application of anything of this kind which so violates the tradition and the common practice that you have to – you can't assume that simply because the people are told that they are going to have to work less than 60 hours, and they understand they work less than 60 hours, that they are going to go into the kind of detail until they see the final regulations; and even under those circumstances many of those people were so firmly of the opinion,

having read the conference committee report the first time this legislation was passed, and having talked to their members on the Hill as late as March of this last year – of this year, that mealtime and sleep time would be deducted, that they were sure – the ones that did understand it, that the regulations would permit that deduction.

[35]Even those that understood the cycle felt that they would be in compliance.

They had a reason – they had every reason to believe on the basis of conversations they had on the Hill and the history of the legislation, and in spite of the discussions that have gone on since, that meal and sleeping time would be deducted; and given that deduction, and their position on the information, many, many jurisdictions felt they were within compliance. There was no reason for them to plan otherwise.

Q Was it your testimony that in the area of fire fighting the work week was the ordinary basis upon which people were paid?

A That's been the general practice.

Q [36] Well, how does that fit in with work cycles?

A Well, you are getting into a very technical subject which I profess I don't – if I had to describe it the way it is described in some of these publications in working out 2-day cycles to 365-day cycles, I would get lost in the jungle of it. I don't profess to be an expert on it.

All I know is that while there is – the fire chief may understand a cycle, the general practice on the people who make the policies, including members of state legislatures as well as local government officials, is that they work on so many hours a week.

Now if you notice in analyzing this, the changes that now are required can comply with the law and place a man on duty six to seven days running, whereas because of the cycle change. Under the old arrangements that very, very seldom ever happened. People worked a day on, a day off, or a day on, two days off.

Now under the scheduling, people can work as many as seven days in a row – six days in a row. For the average person who serves on a city council, and who sets up these schedules and who adopts the budget, he has understood that that fireman worked 60 hours in a week.

Q [37] Is it your testimony, Mr. Pritchard, that historically fire fighters worked a certain number of hours a week and not –

Excuse me. Can I finish the question, please?

– and that that is the way in which fire fighters' duties were prescribed?

A I am saying that has been the common understanding.

Now I understand the cycle situation, and I know that this ranges anywhere from a 2-day cycle to a 365-day cycle, but I am saying that the common understanding of members of state legislature, of members of city councils, of mayors, the common practice, the way it is approached, is one which is not a technical approach in that sense, and when they understand that their employees are working and their employees are satisfied with a 56-hour or 60-hour week, they do not go into the technicalities of the cycles.

Q Well, are your claims of irreparable injury in the complaint based upon the assumption that fire fighters usually work – their duties usually include being paid for

a certain number of hours per week, and this is the basis upon which fire fighters have been paid in the past?

A I am not sure I understand the question.

Q [38] You make claims in the complaint that the new amendments will have an irreparable injury – will inflict an irreparable injury upon municipalities. I am asking if one of the assumptions you are making in coming to that conclusion is that fire fighters worked generally or traditionally a certain period of hours per week, 56, or 60 hours per week, and this is the way their duties were set up?

A I am just not sure how to answer that question. I am – I don't see quite what you are trying to get at.

Q Let me take a different question, then.

I would like to have – this is a letter from Donald A. Slater, Director, Office of Federal Regulations, to Warren D. Landis, Administrator, Wage and Hour Division, July 5, 1974. It attaches the results of a survey of cities of over 10,000 population relative to tours of duty and fire department work cycles.

MR. DODELL: I would like to have this marked Defendant's Exhibit No. 4.

(The document referred to was marked Defendant's Exhibit No. 4 for identification.)

[39] BY MR. DODELL:

Q I would like to show you this.

A Is that the ICMA Report also?

Q I –

A Volume 6, No. 10?

Q I don't know.

Why don't you look at it.

A I am generally familiar with it. I would have to

make sure it is the same thing.

Q In any event, that report was transmitted from Mr. Slater who worked for your organization to the Department of Labor?

A Right.

Q Does not that indicate that traditionally fire fighters have work tours of duty and work cycles that vary from 2-day, 1-day, or 2 days to 360 days rather than a work week, and that that is the traditional practice of fire fighters?

A I don't deny that. I think I said that.

Q Thank you.

A I think I said that there is a difference between what the technician understands and what – and what the [40] general understanding is of the people who would have been alarmed at the implications of this – of the application of this Act.

MR. CHARLES RHYNE: Could we have a copy of that?

MR. DODELL: That was submitted by Mr. Slater to the Department.

MR. CHARLES RHYNE: I understand that. We don't have it here. I want to be sure we have a complete record.

MR. DODELL: We can copy it afterwards, if that is agreeable to you.

MR. CHARLES RHYNE: All right.

BY MR. DODELL:

Q Is what you are saying, Mr. Pritchard, that city officials were not aware that firemen have tours of duty and work cycles of varying –

A No, I didn't –

Q Excuse me. I wish – I have to hold back rather than

to interrupt your answers which is uncharacteristic of me. I wish you would try to wait until I am finished.

MR. CHARLES RHYNE: Your questions are so long, he never knows when you are going to stop.

MR. DODELL: In fact, the answers are quite long [41] and not always responsive.

MR. CHARLES RHYNE: We can argue that at the proper time. This is not it.

MR. DODELL: Yes.

BY MR. DODELL:

Q Mr. Pritchard, are you saying the city officials and budget makers were not aware that firemen traditionally work work cycles of varying lengths rather than a straight work week of 60 hours or 56 hours as the case may be?

A No, I am not saying that. Let me try to phrase it a different way.

I am saying that in the preparation of budgets we begin talking about this in terms of July 1 and October 1 budgets, because you asked me to what extent had these regulations been accommodated in budgets that are now in effect or would be in effect on January.

I am saying that there are many, many factors that are taken into consideration in preparing a local budget.

Here we have an Act which has been passed, which is very detailed. It is covered with a substantial volume of regulations and many interpretive letters, most of which are not yet available. The general impression that comes to [42] the – the general information that comes to the hands of people who are in that process is that if your employees in a particular category are working over 60 hours a week, this is going to have an impact and you better look at it.

Now the fact of the matter is that most of those people understood on the traditional basis that their employees were working less than 60 hours a week, and, therefore, it would not have any significant impact, if any impact at all.

Now the information is, it is true, sent out from ICMA in this kind of a report, but as I noted, this only goes to those people who pay a hundred dollars a year to subscribe to it. I don't know what the number of that is. I suspect it is less than a fifteenth or a twentieth of the total number of municipal jurisdictions.

Now we have also provided – tried to provide some information, but we do not engage in the business of alarming people, of stirring them up until we know what the facts are, as they applied to this particular situation.

Many of these people were in here last March and met with the members of their congressional delegation. I had breakfast one day with a group of those who met with the council for the Senate committee, and they were informed at [43] that meeting, as well as subsequently on the Hill, that they didn't have to worry, that sleeping and eating time would be deductible.

Now they had even those who at that point technically understood the cycle system had every reason to believe a prudent man under those discussions would have assumed that that would have been the interpretation, and they did not get excited about it because they felt they were probably in compliance. They went ahead and prepared their budgets on that basis.

The new regulations which now have come out do not permit that, and many of them are not going to be in compliance. They have not built that into their budgets.

Q Mr. Pritchard, your office sends out information to its members, I presume?

A Right.

Q Your office knew in June – at least as early as June – that scheduling of work periods and work cycles could have an impact on cities even though they employed firemen less than 60 hours a week; is that correct?

A In some categories, depending upon what happened to the eating and sleeping times.

Q [44] Isn't the answer yes?

A Depending upon what happened to eating and sleeping times. It could have an impact.

Q Did your office notify its members that scheduling of work periods and work cycles could have an impact on their liability for overtime? Even if they employed their firemen less than an average of 60 hours a week?

A I would assume we did.

Q Now I call your attention to Defendant's Exhibit No. 3, which was the ICMA Special Report of June 1974 which Mrs. Kocheisen sent to Mr. Hoffman. I call your attention to the second page.

Do you have a copy of this?

A Yes.

Q Does it not indicate about midway down the first – a little below midway down the first full paragraph, after referring to a Wage and Hour Division ruling – does it not state "Thus for firemen with tours of duty of 24 hours or less, no time may be deducted for meal or sleeping"?

A I am not sure I see exactly where you mean. You mean "This report is written . . ."?

Q It is about three sentences above that.

[45] MR. CHARLES RHYNE: Where do you find that

on that page?

THE WITNESS: I see it. Yes, I have it. Right after the parenthetical statement.

MR. DODELL: Oh, you have a missing page.

THE WITNESS: Here it is.

(Indicating.)

MR. CHARLES RHYNE: Okay. Fine.

BY MR. DODELL:

Q So this report at least alerted whoever read it, and your office, that it might be the case that no time would be deducted for meals and sleeping; is that correct?

A I don't quite interpret it that way, knowing the background of it. I think that the report was prepared with the intention of painting the worst situation. I don't think it anticipated or did not anticipate. It indicated that other rules might be issued.

Now we did not – I don't take responsibility for what this says because it is not our report. I don't think we would have advised our people quite that way.

Q But this report in any event alerted your office, because your office received it, and whoever else received [46] it to the possibility that sleeping or eating time would be counted for purposes of calculating overtime? That is correct, is it not?

A We saw this, yes. If that is what you mean.

Q And in advising people as to possible scheduling of 24-hour shifts or 10-14 shifts, this report told cities' options that would be available to them on the assumption that sleeping or eating time would be included; is that correct?

A For those – yes. I am sure that is right.

I would point out, however, that this is only one of

many reports prepared by different people that apply different interpretations to the same subject.

Q What is the international city's – what is it called, the International City Management Association?

A It is an organization of administrators, city managers and administrators of cities, counties, regional councils, other – it is a professional management group of – primary of city managers, but going beyond city managers.

Q Is it connected with your organization?

A Not directly, no.

Q Indirectly?

A [47] No. We associate with each other; we know each other, but it is an entirely different organization. There is no overlapping control over management at all.

Q And for the record, Mr. Pritchard, I would like to note that at the end of this report it says it was prepared by William F. Danielson, Director of Personnel for the City of Sacramento, California; and it says he has extensive experience in advising local governments and fire duty schedules and staffing and has authored an earlier MIS report on the topic.

A Yes.

Q You stated earlier, Mr. Pritchard, that your office participated in the preparation of this?

What was the extent of that participation?

A We participated in the development of the questionnaire. We did not participate in the writing of the report. This was done on their own from the questionnaire.

Q Just to avoid –

A You have a questionnaire in that form, I believe.

Q Just to avoid confusion, I think, Mr. Pritchard, perhaps you are referring to the – there are two exhibits that have been introduced, 3 and 4.

A [48] I am sorry.

No. I am sorry. We did not participate in this.

(Indicating.)

MR. CHARLES RHYNE: By that you mean Exhibit 3?

THE WITNESS: Yes. We did participate in helping develop the questionnaire for Exhibit 4. We did not participate in writing either report, or in the interpretation of the data.

BY MR. DODELL:

Q Now calling your attention to Exhibit 3, and in particular to what is the last page before the list of area directors, in my copy, the first full paragraph states Wage and Hour Division staff members of the national, area, and regional offices have been very helpful to city officials seeking information and assistance.

Now do you agree with that statement or disagree with it?

A I think that is a gratuitous statement. I think that my observation at meetings I have attended where, for example, at the national meeting of this group in Dallas, in October, representatives of the regional offices of the Wage and Hour Division were present, participated in a [49] session, and had to admit in most of the discussion that could not answer the questions.

I think they were – they tried to be cordial and tried to be helpful, but they didn't have the answers and they couldn't answer most of the questions that were put to them. That has been the report that we have had from

most of our people that they have not been turned away in terms of being willing to meet or communicate, but their answers have not been specific enough to be of much help.

Q And what meeting was that?

A That was the annual meeting of the International City Management Association in Dallas, in October.

Q Were you at that meeting?

A Yes, I was.

Q And what are examples of questions that could not be answered at that time?

A Oh, I don't know that I can recall. I know that the group left – the people left the meeting, the discussion, very frustrated by saying, you know, the general response was "Is this what we are going to have to go through every time we want to change a work schedule or set up a different personnel policy? We are going to have to get this kind of [50] runaround to get the kind of answers we want?"

Q Can you recall any specific questions?

A There were a whole series of questions dealing with – well, I think the record of that meeting was taped, and I think if it is imperative that you have that, I assume it could be provided. I would rather let that record stand for itself. I would be – it was about a 2, 2-1/2 hour session, and the questions ran all the way through it. I don't know if I am in a position to recall all those in detail.

Q In paragraph 47 of the complaint, it states Plaintiff Lompoc, California, will suffer vast, as yet inestimable increased costs if it were to comply with the Act with no increase in salary levels and no increase in services

provided.

Do you have any more specific information about paragraph 47?

A Well, the City of Lompoc has been in correspondence with this Department. It, like many other cities, operates with a compensatory time agreement with its employees. The work of local government is very cyclical. The general practice for many years has been for employees to work [51] substantial number of hours during a brief period of time and then take compensatory time at a time that suits their convenience. The elimination of that compensatory time in many jurisdictions is going to increase costs, is going to create hardships for the employees. This is the case in Lompoc. Lompoc itself has determined that it will not comply with the compensatory time provisions, and so advised the Department of Labor that it expects to continue to pay to handle compensatory time off.

MR. CHARLES RHYNE: We can give you the letter that he is referring to if you would like that.

MR. DODELL: If you have it.

Could I have this marked, please, as Defendant's Exhibit No. 5?

(The document referred to was marked Defendant's Exhibit No. 5 for identification.)

BY MR. DODELL:

Q Mr. Pritchard, is there anything in Defendant's Exhibit No. 5 that gives any indication as to the dollar amount of these costs that are referred to?

A No.

Q [52] And I take it you have no idea of what that dollar amount would be?

A Not without the city providing it to me, I would not.

Q And you have no idea, I take it, whether Lompoc is referring to costs for increased costs for firemen, for policemen, or for other employees, or for more than one of those categories?

A I think that – it is my understanding that this applies to the compensatory time under the provisions that went into effect May 1. I assume they would also carry over, however, to the January 1 regulations.

Q Mr. Pritchard, paragraph 48 of the complaint refers to Cape Girardeau, Missouri.

Now do you know whether the Department of Labor has filed a lawsuit that is referred to elsewhere in the complaint against Cape Girardeau?

A I would have to ask the counsel as to the status of that. My understanding is that something has been filed on that, but I am not sure what the exact status of that is at the moment.

MR. DODELL: Mr. Rhyne?

[53] MR. CHARLES RHYNE: Yes. I have the documentation, including a copy of the complaint. This is all being sent in by the city attorney of Cape Girardeau. I may not be pronouncing it right.

These four pieces of paper – I will give them to you – I would like to have them identified so they won't get lost in the paper work.

MR. DODELL: By the way, Mr. Rhyne, these papers you have been kind enough to give me, can we retain those?

MR. CHARLES RHYNE: Yes, you can.

MR. DODELL: I appreciate your courtesy in providing

me these papers.

MR. CHARLES RHYNE: I think we have copies of all the documentation.

Your question was what now?

MR. DODELL: Could you read back the last question, please?

(The reporter read the question as requested.)

MR. CHARLES RHYNE: Let the record show I furnished to Mr. Dodell the complaint and the correspondence that we have with respect to it that has been served on Cape Girardeau.

[54] MR. DODELL: All right.

Could we have marked for identification as Defendant's Exhibits 6, 7, 8, and 9, a letter from Thomas M. Utterback, City Attorney of Cape Girardeau –

THE WITNESS: That is No. 7?

MR. DODELL: This is Exhibit 6, isn't it?

THE WITNESS: 6 would be right.

MR. DODELL: 5 was the letters from Lompoc?

THE WITNESS: Right.

MR. DODELL: 6 is the letter from Thomas M. Utterback, City Attorney of Cape Girardeau, G-i-r-a-r-d-e-a-u, to Jack R. Younce, Y-o-u-n-c-e, Area Director of the Department of Labor; and the second is a letter from the Regional Solicitor of the Department of Labor to Mr. Utterback.

The first letter was October 15, 1974; the second November 20, 1974.

Next is a newspaper clipping from Cape Girardeau. I don't see the name of the publication. It appears – oh, the *Southeast Miss* – it looks like there is probably something else to the title.

Last is a memorandum from W. G. Lawley, City [55] Manager, to the City Attorney, dated December 11, 1974.

(The documents referred to were marked Defendant's Exhibit Nos. 6, 7, 8, and 9 for identification.)

BY MR. DODELL:

Q Recognizing, Mr. Pritchard, that this may not be within your area of knowledge, let me ask, do you know why Cape Girardeau can't merely defend the action that has been filed against it rather than participating in an action here in Washington?

MR. CHARLES RHYNE: Isn't that a legal matter?

THE WITNESS: If you are asking me the legal question as to why one and not the other or something, I can't answer that. It is a legal point.

BY MR. DODELL:

Q Do you know why Cape Girardeau made that judgment?

A Well, I know that Cape Girardeau, like many other cities, if this suit had not been filed by us in the form in which it has been filed, there would have been a very substantial number of independent suits like the Cape Girardeau suit. When Cape Girardeau found we were – when our board approved – acting in this way to do this on behalf [56] of the cities, a number of cities who had intended proceeding along the lines that Cape Girardeau had, either the same basis of facts or otherwise decided not to go to deal with the case themselves, and joined in with – and are looking toward this particular action to deal with their questions.

From a practical standpoint, I would assume that was a consideration in Cape Girardeau, although if there are

other legal implications, I don't understand those.

Q [57] Mr. Pritchard, I am referring to what has been marked Exhibit Nine. This is the memorandum from Mr. Lawley to the City Attorney, and looking at the attached memorandum, according to this memorandum, Mr. Lawley is writing to Mr. Utterback and stating that the starting salary of five men is less than the starting salary per month computed at $1.80 per hour for a 72-hour week?

This indicates, does it not, that Cape Girardeau is unusual in that you indicated that for most localities or basically, there is no impact as a result of the May 1st provision, this would seem to indicate that as to Cape Girardeau there is an impact as to the May 1st provision?

A Yes, that is right. I indicated that generally there would not be an impact. I would not want to say that in every one of 15,000 cities, there was not an impact in some city in some way. There are exceptions, but as the Congressional record itself indicated, the general situation was that most cities were already in compliance in most cases.

Q So, in that regard, at least –

MR. CHARLES RHYNE: I want to make sure the record [58] is clear you are both talking about the minimum wage?

MR. DODELL: Right. The minimum wage as of May 1st.

BY MR. DODELL:

Q In that regard at least Cape Girardeau is not like the more common or general situation?

A In that specific piece, yes.

Q Now, secondly, this memorandum indicates, does it

not, that the fire department in Cape Girardeau utilizes a 72-hour duty week? This is correct, isn't it?

A Yes.

Q So the impact on Cape Girardeau from the amendments that become effective January 1st results from the fact that unlike 85 percent of the cities, Cape Girardeau chooses to use a 72-hour work week; is that correct?

A That is correct.

MR. CHARLES RHYNE: Could I ask one question about the record? I assume you are getting daily copy here. I want to be sure that I order a copy also.

MR. DODELL: Yes. We ordered daily, but realizing it could go to seven, I specified that the transcript for today could be ready by late tomorrow afternoon, and [59] the transcript for tomorrow could be ready by Thursday afternoon, realizing the holiday is Wednesday.

I hope this satisfied you.

MR. CHARLES RHYNE: I wanted to be sure the reporter understands we want a copy of the transcript, also.

MR. DODELL: Could you make sure Mr. Rhyne gets simultaneous delivery?

THE REPORTER: Yes.

MR. DODELL: Could we go off the record for a moment?

(Discussion off the record.)

MR. CHARLES RHYNE: On the record.

With reference to Mr. Dodell's request for the documentation that we have that relates to the paragraphs of the complaint, we are going to furnish to him with respect to those paragraphs of the complaint

that are factual and where we have documents that back up the facts, the exhibits that we have for those, and we will mark them with respect to each paragraph of the complaint so you can readily relate them up to it.

MR. DODELL: That is fine. Thank you, Mr. Rhyne.

[60] MR. CHARLES RHYNE: As we go off the record, we will give you a complete set of all the documentation. That might be easier.

MR. DODELL: Fine.

MR. CHARLES RHYNE: And we can mark those any way that you want to. You are up to Exhibit 9, so the ones that have not been marked, you can mark them. That is fine.

Off the record.

(Discussion off the record.)

(The reporter marked Defendant's Exhibits Numbers 10 thru 36, inclusive, for identification.)

MR. DODELL: While we were off the record, Plaintiff's counsel provided Defendant's counsel with documents relating to paragraphs four through 72 of the complaint; and they have been marked Defendant's Exhibits for identification, 10 through 36.

And I want to thank Plaintiff's counsel for providing those documents to us.

BY MR. DODELL:

Q [61] Paragraph 49 speaks of the payment of time and a half instead of compensatory time off for the more than 7,000 overtime hours accumulated annually merely to provide necessary snow removal services.

Exhibit 10 indicates they have been given the option to accept compensatory time off on the basis of one and a half hours off for each overtime hour worked or to

receive time and one-half overtime pay.

It goes on to say, "By far the vast majority of the workers have chosen to take compensatory time off during the summer months."

I take it as far as you know the, that Salt Lake City did provide an option to the employees to receive time and one-half overtime pay for the work that they did in overtime?

A Yes, they did. I think you will find that is true in several of these other documents.

Q And is it not correct that – well, I think it says – we just read it, the time and one-half for each overtime hour worked – excuse me, that compensatory time for each over-time hour worked was also on the basis of one and one-half hours off for each overtime hour.

[62] Paragraph 49 also speaks of discontinuance of shift trading. Now, is it your understanding that the new amendments prohibit shift trading?

A My understanding is the new regulations that have come out now does permit a certain amount of shift trading within given periods.

MR. CHARLES RHYNE: It does relate to police and fire, only, right?

THE WITNESS: On the new regulations, yes, that is right. It would not affect these people.

I would point out that our understanding of the situation in Salt Lake City is that because of this – this tends to be true in many other jurisdictions – that because of the concentrated – concentration of requirements for snow removal in very brief periods of time, that the need for manpower is rather substantial. And that the employees in that area, many of them

would not work at all on these jobs if they were not permitted the compensatory time off.

The nature of their interest, the people who do this, is that they want that summertime available, and the pay for time and a half at that time would not be of interest to them.

[63] The mayor who happens also to be the new senator from Utah, has gone into this in great detail with me. He says that he expects a very substantial number of those employees would not continue their employment with the City under the circumstances.

Q Well, do you know of any surveys that have been taken to establish this, or is this just his opinion?

A I think it is just based upon what he would have to do as mayor of the city – to provide for that type of service in another year.

BY MR. DODELL:

Q You are reflecting what the Mayor of Salt Lake City told you?

A That is right.

Q Who is that?

A He is now Senator Garn.

Q You are reflecting Senator Garn's judgment –

A I am reporting his judgment.

Q May I finish the question?

You are reporting Senator Garn's judgment that employees would quit if they had to be paid time and a half for overtime?

A [64] That is right. Not all of them, but a good many of them would.

Q You don't know that he has taken any survey to establish that?

A Well, I assume as any good manager has a pretty good idea of what his employees think, and how they feel and what their reaction would be.

Q What is it –

A It is also dealt with in your other Exhibit 11, I believe.

Q What is the difference, Mr. Pritchard, between receiving compensatory time in the summer at the rate of one and a half hours for each hour overtime worked and receiving one and a half times the pay during the winter months and being laid off in the summer months?

A Well, I suppose if you are looking at exactly the dollars, you are paying the dollars out, but the fact is that you deal with the whole question of morale, of continuity of employment, of retention under pension systems.

Once you are laid off, you lose your hospitalization and health insurance, your contributions to your retirement programs.

[65] You are unemployed as far as your credit is concerned. It is a terrific morale problem for employees under that kind of a situation. As long as they are continued in compensatory time, they are still in the – still an employee of the city.

Q So, if I understand your testimony correctly, there is no net difference in cost – may I finish the question?

A Go ahead.

Q If I understand – if I understand your question – your answer to the question correctly, there is no dollar difference in cost to Salt Lake City between receiving compensatory time in the summer at the rate of one and a half hours for one hour worked and taking one and a

half times the pay in the winter and taking the summer off.

A Well, I suppose that would be true. I don't think that is the extent of the impact, however. I think if you are trying to make the point that because there is not a significant fiscal impact on that particular aspect of it, that there is not justification for being concerned about the impact of the legislation, then I would say that you only understand a fraction of the problem.

Q [66] But the complaint also that Salt Lake City will suffer the following irreparable injury as a result of the 1974 amendments: the payment of time and one-half instead of compensatory time off for the more than 7,000 overtime hours accumulated annually merely to provide necessary snow removal services; and it seems to me your testimony is that in terms of cost to Salt Lake City, the payment of time and a half instead of compensatory time off would result in no additional cost to the City of Salt Lake.

A Well, the damage – it seems to me the key to that phrase is not just dollars.

The irreparable injury goes much beyond just a dollar cost. There is a cost in employee morale, there is a cost in continuity of service, there is a cost in the ability of local officials to maintain an esprit de corps among the employees it maintains.

This is a structure of employment which has best fitted the particular geography and climate and weather conditions and employment interests of the personnel in that area.

And the political leadership has negotiated that [67] with its employees as the thing that works best for the

city and works best for the employees, and works best for the community.

And it creates a serious injury to the ability of the city to run its business the way the community wants it run.

Q Would leave without pay during the summer months cure any of these other problems or all of them?

A I am not sure that that is possible. There is – there would be a legal question there as to what authority the city had to grant leave without pay.

Q Do you know whether there would be a legal problem?

A No, I don't.

Q Do you happen to know what the pay period is in Salt Lake City, a week, a month, or biweekly?

A No, I don't.

Q Would it be true if the pay period is two weeks or a month, that within the pay period there would be some flexibility in terms of what you call compensatory time?

A State that again. I am not sure what you mean.

Q [68] Let me try to state it another way. If a pay period is a month, for example, and an employee worked 50 hours one week, might he work less hours or fewer hours the second, third, and fourth weeks and would it still comply with the – with his total pay – would it still comply with the provisions of the Fair Labor Standards Act Amendments and give the same results as if he were getting compensatory time?

A I am not sure that it would at all. I think it depends upon the type of employee you are dealing with and what he is working with.

This applies – in Salt Lake City, this happens to apply to the situation they cited here, that happens to apply to

those people who engage in snow removal.

Now, who knows when it is going to snow and how long it is going to snow? They may need them every day for a longer period of time.

That is something that we have to be available for.

In other jurisdictions, the problem may not be snow removal; it may be a period of tax collections when offices stay open extra hours. It may be a period for some [69] employees when the city is holding budget hearings, and certain employees work extra hours; and then after that period is up, why compensatory time off is what the employee and the city prefers.

Q In some of those situations as we have indicated earlier, where the person would not be completely laid off in the summertime, if he worked a shorter period of time in the summer, let's say 30 hours, 35 hours, or 25 hours, the net cost to Salt Lake City would be the same?

A Well, I don't know – you are creating a hypothetical situation which I am not sure of. You know, I don't know what time a person would have accumulated and whether it would work out that way.

Q Well, suppose a person is working during the busy season in taxes, tax offices, and he works, let's say, ten hours extra a week.

A Yes.

Q Under Salt Lake City's program, he receives – or under your example, he would receive one and one-half hours compensatory time?

A Right.

Q Under the amendments he would receive one and [70] one-half times the amount of pay?

A Right.

Q But if he received one and one-half times the pay during the busy season, and he worked less during the slack season, in an amount of one and one-half times the amount of time he worked overtime, would not the net cost to Salt Lake City be the same?

A Yes, I think I said dollar-wise it probably would be, but that is not the limit of the impact.

Q On the top of page 22, there is a reference to increased costs for the hiring of or elimination of student interns from the University of Utah.

Now, I haven't had a chance to read fully these two letters that you have provided to us, but is this referring to students who would be employed in regular employee capacities, for the city of Salt Lake City?

A I think the letter on page three, your Exhibit number 11, on page three, first paragraph cites the use of interns.

Q [71] Well, do you know whether the – what the reference to "interns" is, whether this is to a part of the student program where the person must do some internship for the – in terms of complying with his course requirements, or whether it's in terms of having an employee simply work like any other employee for the state or the city?

A I think it's probably both. Most cities – you will find other letters in here, in other exhibits – a similar situation where many cities use interns from universities as part of their ability to earn some income to stay in school to supplement their resources for academic work.

And, in fact, we have many of them come to us who offer to work for nothing, just to get the experience; and they do that with cities. Quite frequently the cities pay

them just a nominal amount to have some money in their pocket. It's not really considered by either the employee or the employer as a job in the sense that other positions are productive employment, although they do productive work.

A number of these exhibits cite the fact that they are terminating those programs.

Q Is the irreparable injury to Salt Lake City then that it believes that it should be free to use students in [72] a different way from that in which private industry could use interns?

A I think the view is that they should be able to work out their arrangements with their interns and give them an opportunity for training. And if the students want to use that. and compensate them in the way that the students and the city agree upon.

Q So that if a student worked for a private industry and wanted to agree with a private industry, you would think he should be under one system of regulations, but if the same student were doing the same kind of function for the same kind of purpose for the city government, he would be under a different system of regulations?

A I think you are dealing with two different animals in this situation. You are dealing with, for the most part, the students who have a commitment and a dedication to a public service, that want to be involved; and in many cases, they are willing to work for nothing, just for the opportunity to be in the business, to participate, and to have the experience.

You are dealing in a public center where there is a degree of public accountability and public responsibility [73] and no profit motive involved. There is no incentive

in that sense to underpay and compete as there is in the private sector, or to exploit.

The use of interns in these cases, in many cases, requires considerable additional investment on the part of the city in terms of supervision; and the cities are willing to do this and the political leadership and administrative leadership is willing to do it, because it's a contribution to the public interest.

I think you are dealing in quite a different business when you are talking about the public and the private sector and the use of interns.

Q Do you have any imformation as to specific functions that are performed by these interns from the University of Utah in Salt Lake City – for the Salt Lake City government?

A No, I don't in this particular case; but I know generally what they do in other cities. I assume the thing is similar.

Q So in the case of Salt Lake City then, you don't know the extent to which these interns may be performing the same functions that people are performing either who are [74] regular employees of the City of Salt Lake, or that may be similar to employees who are working for private business?

You don't have that information?

A I don't have that information.

Q Thank you.

I skipped one clause at the bottom of page 21 and carrying over to the top of page 22, which refers to increased costs for the hiring of or elimination of students to work in the public parks each summer.

Do you know how that relates to the recreational

exemption that is provided under the statute?

A I think there is a paragraph in the letter that also deals with that. On page 2 of Exhibit 11.

Q You referred to that paragraph of the letter?

A Yes. I was referring to the – to the paragraph on page 2 of Exhibit 11.

Q I see. Your answer to that question would be incorporated in that paragraph?

A That's right.

Q Looking at page 2, I see the last paragraph which says, "I mentioned previously our road maintenance and snow removal problems, and the serious impact this will have on [75] Salt Lake City.

"After a careful review of our budget problems and consideration of the impact of the Fair Labor Standards Act, we are cutting back 100 employees by attrition. Beginning October 1, 1974, we will not replace terminating employees unless the new hirees receive special approval by the personnel director, city auditor, and Board of City Commissioners."

Doesn't this conflict with what you previously said in terms of there being no budgetary impact on Salt Lake City if people are laid off or given leave without pay in the summer months, and work overtime in the winter months?

A Well, I suppose when you ask me the question is there no budgetary impact, to say that it comes out exactly even is to – you know, I am not constructing a balance sheet here. I am giving a judgment; and I think that within – when you are talking about 7000 hours or work, and you are talking in terms of a small number of employees, I think that there's apt to be – there's apt to

be some imbalance in the situation.

But I don't think that they are necessarily in conflict. I think – I am giving you a general answer to a question you are asking me now to construct a profit and loss [76] statement or a cost accounting statement. I don't pretend to be able to do that to that degree of accuracy.

Q Why would there be an imbalance?

A Well, I suppose because you are not going to be able to – you are not going to let everybody who accumulates time all go at the same time; some of them you are going to have to keep because you have other work, street maintenance that has to go on during the summer. The summer is when you do your street maintenance work. You remove snow in the winter.

You are going to have some of those people that you are probably going to end up having to pay time and a half and keep them on. And you are maybe going to have some of them that have to work overtime in the summer, too.

Your degrees of flexibility, what you have eliminated are the degrees of flexibility in this so that you can't match up one for one; and you are going to have some extra costs involved.

I think you can sit down and construct that and it would come out to the point where you are not going to come out with 100 percent balance

Q If everybody got all of the compensatory time to [77] which he was entitled, why would there be an imbalance?

A Well, I don't know that I can construct that exactly. I have to take the city's word for it. This was put together by the city, by the personnel director in

consultation with the city attorney. I assume they know what they are talking about.

I don't know that I can – that I should be – should be expected to be in a position to detail every dollar for 15,000 municipalities. It's our practice over 50 years of activity to report the information the same as anybody else would that is given to us by city officials, and it's not the habit of city officials to provide this kind of information and lie about it.

I assume they know what they are talking about.

Q As a matter of logic, wouldn't you agree that your prior testimony appears to be accurate and that this sentence appears to conflict with it?

A No. I don't think my prior testimony was attempting to – as I say – to construct a balance sheet. I was indicating that you – you asked me at that point if I thought that it – there would be any significant fiscal impact whether it would balance out.

[78] I said I thought it probably would. But that's a general statement. I don't know that it would balance out 100 percent. I think it's quite possible that there would be some variance in there.

What all causes those variances, I am not sure I can explain in terms of this particular letter, but I think if they have identified some areas in which it will not balance out, why, that's what they have indicated.

MR. CHARLES RHYNE: I think in fairness to the witness, your questions were mostly hypothetical rather than facts; and this letter deals with actual facts, Mr. Dodell.

MR. DODELL: Well, this letter has to deal with a hypothetical, too, Mr. Rhyne, because it has to compare

the costs of complying with the Act with the costs of going on the way they have been going on.

Neither of those have occurred yet. They are talking as to the future also.

MR. CHARLES RHYNE: They are talking about having to cut off 100 people, for example. That's a pretty hard fact.

MR. DODELL: I would rather not argue with you, Mr. Rhyne. The fact is before being called – before this sentence was called to Mr. Pritchard's attention, he said – [79] and the record will bear this out – that applying the Act in the way in which I had indicated in my hypothetical, would have no budgetary impact on Salt Lake City, but that there would be other impacts on employee morale, on continuity of employment; and the record will speak for itself.

I don't think this is the forum in which we should debate the point.

MR. CHARLES RHYNE: I would certainly agree. You were arguing with him. I thought I would point out you are dealing with hypothetical facts and this letter deals with actual facts.

MR. DODELL: The record will disclose whether that's a fair reflection of what we were talking about.

BY MR. DODELL:

Q Mr. Pritchard, is one way in which this imbalance could occur if Salt Lake City did not find it possible to give the employees all the compensatory time they had earned because it needed them for road improvement or road maintenance?

A I would assume in that case it would work the other way. The city would end up in effect the winner in that

case in having money left over, wouldn't it?

Q I don't understand your answer.

A [80] Well, if a man is entitled to time and a half off and you don't give it to him, and you work him and pay him at the regular time, you have got the work and you haven't paid him for his time and a half; so the city – that wouldn't end up costing the city money. That would end up with the city coming out ahead, it seems to me.

Q That's my point, Mr. Pritchard.

A I don't think that would justify this particular statement.

Q My point, Mr. Pritchard, is if the city were to come out ahead because in certain circumstances if all the employees couldn't use up their compensatory time, then there would be a budgetary impact on the city as a result of it's not – as a result if it's paying time and a half rather than using compensatory time.

A But what kind of a budgetary impact?

Q Well, we were trying to figure out why your earlier impression was not accurate; and I am offering –

A I am not agreeing it wasn't accurate. I am still saying I don't think there was a conflict between the two.

Q All right.

I think we should move on to another area.

A [81] All right.

Q Now, don't these letters, Mr. Pritchard, indicate that notwithstanding the problems that Salt Lake City has – or at least indicates that it will face as a result of the amendments, it has been trying to bring itself into compliance with the Act? That's correct, is it not?

A That's right. And that's what I indicated in my opening statement, I think; also, at a higher cost, at a

lower level of service, and with less satisfactory arrangements for themselves and their employees.

Q Well, when you set a higher cost, Mr. Pritchard, I think you indicated that as far as you could figure out there would be no budgetary impact; was that not correct?

MR. CHARLES RHYNE: That depends – let's don't get such a confused thing. You were asking him about compensatory time. Don't relate that up to the whole picture, Mr. Dodell.

I don't think that's a fair question. Tell him what you are talking about and then he can answer it correctly.

MR. DODELL: Well, Mr. Rhyne, Mr. Pritchard volunteered an answer that really wasn't responsive or went beyond the question that was asked.

[82] All I asked was that – do these letters reflect what – that Salt Lake City is attempting to bring itself into compliance with the Act; and the answer to that would have been yes, Mr. Pritchard – had he volunteered other observations.

MR. CHARLES RHYNE: No. He –

MR. DODELL: Let me finish. He went on and volunteered other gratuitous observations.

Now in part his observations said there would be increased costs to Salt Lake City as a result of coming into compliance; so I will repeat this question then.

BY MR. DODELL:

Q With regard to the claims that Salt Lake City made as to an increased cost resulting from its people involved in snow removal, do you adhere to your earlier testimony that as far as you can see, this would not have a budgetary impact on Salt Lake City?

A That isn't the question you asked me before.

Q That's the question I'm asking you now, Mr. Pritchard.

A I would say that I can't – from the information I have, there would still be an impact. Now, you are limiting your question – if you are trying to limit your question only [83] to compensatory time off, that's one thing. If you are trying to draw that question into the question of the impact of the Act, then I can't make that transition, because in terms of compensatory time off, I'm saying that generally you would have to assume that if everything worked out evenly, there wouldn't be any cost.

The city attorney or the city auditor in a specific statement is saying apparently it will not work out that way according to their calculations. I don't think those two are inconsistent.

I am also saying there are other costs that are involved; and to say that – for you to try to draw the inference that because the compensatory situation works off in a hypothetical argument to come out even, that there is no budgetary impact in the Act, then I have to deny that because there are other cases cited in here to indicate that there are other implications beyond that.

Q All right.

In terms of compensatory time, your testimony is that generally a city could manage its affairs in such a way that there would be no net cost to the city to comply with the amendments; is that correct?

A [84] In dollars paid out, if it all balanced out, I would assume that would be the case.

Q Now with regard to the impact on morale, Mr. Pritchard, do you know what positions unions have taken with regard to the Fair Labor Standards Amendments of 1974?

A Which unions?

Q Is there a general union position?

A Well, I know what the national unions – I know a lot of the local labor councils have not agreed with the national labor unions. In fact, there were a whole host of local fire fighters' organizations who dramatically opposed their inclusion under the Fair Labor Standards Act.

Q The National Fire Fighters Organization supported the amendments?

A Yes, they did.

Q Did the –

A Many local councils did not.

Q How many?

A I don't know the total.

Q Do you know what position the American Federation of State, County and Municipal Employees took?

MR. CHARLES RHYNE: I don't see what relevance that [85] has. It's not relevant to any issue in this complaint.

MR. DODELL: The issue it's relevant to, Mr. Rhyne, Mr. Pritchard has testified that the amendments will cause enormous morale problems. So one must assume that these national unions are taking positions that are contrary to what would be good for the morale of the employees.

I want to know if that's Mr. Pritchard's testimony.

MR. CHARLES RHYNE: He was relating his to the

Act. You are relating yours to the union. I don't quite understand.

MR. DODELL: Mr. Pritchard's testimony is that the amendments will cause serious morale problems among employees. Now, unions generally purport at least to speak for the rights of their employees; so I take it that if Mr. Pritchard is to be consistent, he would – his testimony would be in this instance, the national unions are speaking contrary to the interests of their employees.

That's what I want to elicit from him. It seems to me to be perfectly relevant to test his testimony that these amendments which purport to benefit employees are causing morale problems among employees.

MR. CHARLES RHYNE: All right.

THE WITNESS: I think I can answer that question [86] in the sense that what I am reporting to you and what you have before you is a statement from the City of Salt Lake City which says that – which describes this. I am reporting to you the statement made to me by the Mayor of Salt Lake in arriving at that judgment.

I am not reporting to you my opinion. The labor unions may be reporting to you their opinion.

I would suggest that if you want a comparable answer, you ask the employees of Salt Lake City, not the national union, because this has been worked out with the local employees in that city, and in that particular city, that's the way those employees prefer to work.

What the national labor union generalizes is not necessarily the view of that local jurisdiction, any more than my generalization would apply. I am not generalizing. I am giving you a specific situation.

BY MR. DODELL:

Q When you say this is the way in which the employees in Salt Lake City prefer to work, you are referring to Senator Garn's opinion as reported to you; is that correct?

A Yes. That's an agreement they have worked out in negotiations. I think that's a fair conclusion.

Q [87] But you are basing your opinion on what Senator Garn told you; is that right?

A Yes. I am reporting a factual statement by a responsible local public official.

Q As Mayor, he represented management in the relationship between management and labor; that's correct, isn't it?

A Yes, that's true.

Q Thank you.

MR. CHARLES RHYNE: He also represents the whole public interest, not just part of it. He represents all the people, including labor, unions, everybody else.

MR. DODELL: Mr. Rhyne, you are not the witness.

MR. CHARLES RHYNE: I know, but I think you are trying to –

MR. DODELL: I think you will have an opportunity in cross, if we don't go until 7:00 o'clock, to elicit what you would like to elicit.

MR. CHARLES RHYNE: All right.

MR. DODELL: Off the record for one moment.

(Discussion off the record.)

[88] BY MR. DODELL:

Q With regard to paragraph 52 of the complaint relating to Los Angeles, Exhibit 52 is all that you relied on in the swearing to the truth of paragraph 52; is that correct?

A Let me read that again. Just a moment. Yes, that's right.

Q Do you know how many hours firemen in Los Angeles averaged in 1974?

A Not offhand; not without looking it up.

Q Well, you certainly – in swearing to paragraph 52, did you have in mind how many hours of overtime – excuse me, how many hours firemen in Los Angeles worked in 1974?

A No, I didn't think that was critical. We – the city advised us, given their knowledge of the situation and the knowledge of the act, what the difference would be; and I think that their calculation of the difference is all I need to know.

I don't know that I should be or would be expected to know the hours worked by firemen in 15,000 jurisdictions and remember them.

Q [89] Is there anything in Exhibit 52 that explains how Los Angeles calculated this increased cost?

A Well, I – it was calculated at the request of the mayor by Battalion Chief Mike Mitchell who spent the better part of two weeks back here at various times working with the department here and meeting with people and appearing before the hearings.

He understands the act, probably along with Bill Danielson, as well as anybody in the country. I would have no reason to doubt but what his calculations were made with a pretty full knowledge of the act.

Q But again, answering the question, you have no idea, do you, how he calculated that amount of money?

A He calculated it, I would assume, on the basis of their current work schedules and work plans and the

knowledge of the act, and how it would impact on the city.

I don't know what you mean there. Do you want a yellow pad with his calculations on it? What are you trying to get at?

Q You have never seen a yellow pad with his calculations?

A No, I don't think that would be expected. The [90] city reports – in fact, the city reports at the request of the mayor. I think those figures are safe to rely on. We do this all the time. In testimony with the Congress, the executive agencies, we have no reason to doubt but what they tell us the truth.

Q Do you know what the firemen's work week is in Los Angeles?

A Not offhand.

Q Well, I have here – and I can't make this an exhibit, although we could copy the particular page, because we borrowed this book – this is a book called *Annual Fire Department Salaries and Working Conditions Surveyed in the United States and Canada, as Reported by Locals January 1974*, compiled by Research Department International Association of Fire Fighters; part one is salaries, part two is working conditions; and it appears to indicate for Los Angeles work week, 56 hours. I will show this to you.

A If I would have had to make a guess, I would have said 56. That doesn't surprise me. Why is that relevant? What do you want me to do with that? It obviously deals with a cycle.

[91] You notice that goes back and says the same thing I have been saying. They are reporting a 56-hour

week. Do they discuss the cycles? That's the way everybody has reported for years. They just reported a 56-hour week. They don't say two-day cycles, or 365-day cycles. That goes back to the point I made earlier, why it is so hard to get cities to figure out what is happening to them. Even the Fire Fighters' union reports it that way.

Q Mr. Pritchard, I would ask you to limit yourself to responding to the questions because – in developing facts, we proceed on a question-and-answer basis rather than just what spontaneously may occur to you. I would appreciate it if you would limit yourself to responding to the questions.

MR. CHARLES RHYNE: I think he has up to now. You have asked him very general questions, Mr. Dodell.

MR. DODELL: Could you read back the last question, please, if there was one?

(Whereupon, the Reporter read from the record, as requested.)

MR. DODELL: There was no question pending, Mr. Rhyne.

[92] May I finish, Mr. Rhyne? Excuse me.

THE WITNESS: You asked me a question.

MR. DODELL: There was no question pending. I think Mr. Pritchard volunteered his statement without a question pending.

MR. CHARLES RHYNE: Are you through?

MR. DODELL: No, I am not through.

MR. CHARLES RHYNE: Go ahead and finish.

MR. DODELL: I think Mr. Pritchard volunteered his statement without a question pending. I think my remarks were quite on point that I have been rather patient, but Mr. Pritchard has been volunteering a lot of

information.

I hope his questions would be more directly responsive to the questions.

I would also like to offer that with respect to your comment, Mr. Rhyne, that the questions are not – are general, I think the record will show that every time I have asked a specific question, Mr. Pritchard has said – well, not every time, but many times when I asked specific questions, Mr. Pritchard said, "I don't know the answer. This is just what the city has reported to me." I think [93] that's significant. I think the Court will draw its own conclusion from that fact.

Now I am through, Mr. Rhyne.

MR. CHARLES RHYNE: I think all of your comments are totally uncalled for. I have let you ask very general questions, most of which have no relevance to anything. You have reached out here and gotten a report that you don't even show to us, and you have asked questions about the firemen and their hours and his comment related entirely to firemen and hours.

So it was in response to your question. You are making as many statements as you are asking questions. It creates a very confusing record because you go from the general to the specific, and then sometimes you don't relate your specifics up to anything.

So we have got a – really a very fuzzy record here because of the way that you are asking your questions and what you are including in them.

MR. DODELL: Are you through?

MR. CHARLES RHYNE: I am through.

BY MR. DODELL:

Q Mr. Pritchard –

[94] MR. DODELL: By the way, Mr. Rhyne, you said I haven't shown you this. Let me show it to you. Take your time and look at it. I am showing you the document that I previously referred to.

MR. CHARLES RHYNE: The page you have given us relates to Los Angeles County, not Los Angeles City.

MR. DODELL: That may be correct.

MR. CHARLES RHYNE: I am looking at pages 131 and 132.

MR. DODELL: Then it is my error, if that is so.

MR. CHARLES RHYNE: The prior pages don't have Los Angeles City at all. I just have to give it back to you, because page 131 and 132 only refer to Los Angeles County, and have nothing to do with the city.

MR. DODELL: You are correct, Mr. Rhyne, that the reference here is to Los Angeles County.

Let me ask –

BY MR. DODELL:

Q Do you know what relationship there is between Los Angeles County and Los Angeles City?

A No, I don't follow the county situation.

Q But you do not know the work week in Los Angeles [95] City? I think you have answered that.

A Not specifically, no.

Q Do you know it generally?

A I would assume, because of the general situation on the West Coast, that it is probably 56 hours; but I wouldn't want to swear to that without checking it out.

Q And if Firemen all worked a 56-hour work week in Los Angeles City, then the – and if the work period and work cycle were adjusted to comply with the act's provisions, then there would be no impact by the

amendments; is that correct?

A If the adjustment is made is what creates the fiscal impact. That was the point I made earlier. That's why I made the point earlier that many cities who looked at a report like this and said okay, we are in compliance because we are working less than 60 hours, this doesn't affect us; and they didn't adjust their budgets because they didn't think it applied.

Now they get in and start looking at the work cycles, they find they do have an impact. The one document that you submitted – I think that fact is pointed out, back here in Exhibit 3, I believe it is.

[96] There's a – either three or four, there is a reference to the fact that – on page 3, it says, "Any fire duty cycle less than seven days or more than 28 days in length will cost the city unnecessary overtime. For example, some cities presently have a fire duty cycle three days in length. This cycle calls for 24 hours duty, on duty, and 48 hours off duty. Even though this cycle is equivalent to an average of 56 hours per week, a city that maintains this particular cycle beginning January 1 may be liable to pay unnecessary overtime."

So in order to bring that in adjustment, and to avoid the overtime, they still end up with a cost because they have to put on more people in order to comply.

Q But, Mr. Pritchard –

A That's what produces the cost in here.

Q Mr. Pritchard, since June, your office has had information – I think we went over this earlier – which would have permitted any city that had a 56-hour work week to come into compliance with the act; is that not true?

A No. Because the regulations were not issued until last week. The law doesn't apply until January.

Q But, Mr. Pritchard, I would ask you to examine [97] Exhibit 3 and does not Exhibit 3 tell cities a way in which they can come into compliance with the act if they have a 56-hour work cycle, assuming the most expansive view of the regulations; and that – let me complete the question. May I complete the question?

A Yes.

Q And does not this bulletin indicate that it was, even under the most extreme view of the regulations, it was possible way back in June for a city to arrange a 56-hour work period so that it would have no liability under the amendments? Is that not true?

MR. CHARLES RHYNE: Just a minute. Just a minute.

There are about six questions in one, all based on a lot of assumptions based on regulations that hadn't even been put out in tentative form in June; and it is impossible for this witness to give a meaningful answer based on all of the assumptions that you have given him.

There were no regulations in June when this came out, not even proposed regulations. No one could even speculate as to what they might be with any degree of accuracy. So to try to get him to speculate and give answers is really requiring an answer that's so much in the [98] speculative as to be worthless and the kind of thing we are going through.

MR. DODELL: Are you directing the witness not to answer, Mr. Rhyne?

MR. CHARLES RHYNE: I am not going to do that.

MR. DODELL: Can you answer, Mr. Pritchard?

THE WITNESS: I have a hard time answering because,

as counsel said, there are about five questions posed in there with a lot of conditions.

I think in the earlier part of the questioning I indicated that some cities had this report based upon their subscription to it; and so to that extent they had some notice. There were a number of "ifs" that were still involved, including eating and sleeping time which affected their budgetary planning. That was one – so, yes, some had notice; but to prepare a budget and to budget on the basis of this would have been difficult.

I think the second part of it is that the question we are dealing with is how did Los Angeles calculate these figures; and these are calculated without regard to whether the money is in the budget and when they had notice for it really doesn't make that much difference.

[99] The question is whether they have it in the budget or not in the budget, whether it will cost them that much money.

BY MR. DODELL:

Q Mr. Pritchard, does not this state, on page 2 – by this, I am referring to Defendant's Exhibit 3, "For cities that use a 24-hour fire duty period, a 10-14 fire duty period, or a 9-15 fire duty period, there are only two possible fire duty schedules between 7 and 28 days that are equivalent to an average of exactly 60 hours per week"? And does this not then give the examples of those schedules.

A Yes.

Q So doesn't this lay out pretty plainly to the cities how they could comply with the act and not pay overtime, and still have a 60-hour schedule?

A I would assume there are more options if you work

50 – if you did on a 56. If you have been on something other than this schedule.

Q There were more options?

A I suppose.

Q Thank you.

[100] So if one had a liability – if a city had a liability and used the 56-hour work week, the liability would result from its not choosing any of the options that were available to it?

A The question I – the question I understand we are dealing with is how did Los Angeles calculate these numbers? Are we back to where we were? Are we going to reargue this again? I thought we were trying to answer the question how did Los Angeles. That's what you were trying to get at.

Q Mr. Pritchard –

A I don't know where you are.

Q I think you should just try to answer the question that is asked. If counsel has an objection –

MR. CHARLES RHYNE: Well –

MR. DODELL: May I finish?

MR. CHARLES RHYNE: No. I want to point out your question is unanswerable because they are so confusing.

MR. DODELL: I think you should extend me the courtesy of letting me finish.

MR. CHARLES RHYNE: I have been very courteous to you. Maybe too long.

[101] MR. DODELL: You can make your own judgment in that regard, Mr. Rhyne. I think you should wait until I finish, and I will wait until you finish. I have been waiting until the witness finishes, although I thought his answers went beyond the questions. I have

been very patient.

MR. CHARLES RHYNE: I disagree with that, but go ahead.

MR. DODELL: You are entitled to your disagreement.

The last question that I asked is: If a city with a 56-hour work week would risk liability as a result of the Fair Labor Standards Amendments, would this result from its not taking one of the options that is – has been available to it?

MR. CHARLES RHYNE: That's a legal question. How can you expect this witness to answer that? You are asking him about liability.

MR. DODELL: Well, Mr. Rhyne, there is a pending question. Your objection is noted; either direct the witness not to answer or permit him to answer.

MR. CHARLES RHYNE: I am not going to direct him [102] not to answer. I will let him do the best he can. I think it is difficult for a non-lawyer to answer a legal question. You asked about liability.

MR. DODELL: Mr. Rhyne, as you know, objections of that nature aren't waived, it seemed to me, by not being made. I think the flow will – if you are not going to direct him not to answer –

MR. CHARLES RHYNE: I am not going to direct him not to answer. You want the question reread?

THE WITNESS: Yes.

(Whereupon, the Reporter read the question, as requested.)

THE WITNESS: The question doesn't make sense to me the way it is stated.

MR. CHARLES RHYNE: Okay. That's it.

BY MR. DODELL:

Q It's been your testimony, has it not, Mr. Pritchard, that under the 1974 amendments, a city with a 56-hour work week could be liable for time and a half overtime for fire fighters, is that correct?

A It could be.

Q It could be.

[103] Now you have also indicated that a city – in response to questions, that a city with a 56-hour work week had more options available to it than a city with a 60-hour work week; is that correct?

A I said I would assume. I am not technically competent to go through all those different calculations; but it would just seem logical to me that it would.

Q Now what I am asking you is if a city with a 56-hour work week becomes liable for overtime payments under the '74 amendments for fire fighters, would that result from its not taking an option that is available to it?

A Well, I suppose it could be. If it had notice.

MR. CHARLES RHYNE: I think we ought to recess for lunch pretty soon.

MR. DODELL: I am hungry. We can recess now.

MR. CHARLES RHYNE: How about recessing until 25 to 2:00?

MR. DODELL: Would 2:00 be better?

MR. CHARLES RHYNE: Fine.

(Whereupon, at 12:35 p.m., the deposition was recessed, to reconvene at 2:00 p.m., this same day.)

[104] AFTERNOON SESSION

(1:50 p.m.)

Whereupon,

ALLEN PRITCHARD, JR.

resumed the stand as a witness and, having been previously duly sworn, was examined and testified further as follows:

EXAMINATION (Continued)

BY MR. DODELL:

Q Now in paragraph 53, this is a reference to Sacramento, California. The first question I have is that there's a reference there to the budget for the current fiscal year, 1974-75, as having already incurred an extra $350,000 cost due to mainly non-police and fire services.

Do you know whether that refers to a budgeted item or an actually spent item?

A Will you identify where you are?

Q I am sorry. Paragraph 53 of the complaint.

A I see. All Right.

Well, this is explained in Exhibit 14 in a communication from Mr. William Danielson, the director of personnel on page 2. The complaint cites the data.

Q [105] And at page 2 also it says, "This has" – "the sudden cutoff of the compensatory time usage for employees other than police officers and fire fighters is estimated to have resulted in additional costs in the current 1974-75 budget approximating at least $350,000."

Do you know whether this is actual cost or budgeted costs?

A Well, since the year isn't up, they obviously couldn't have incurred all of it. It is obviously what they estimate will be spent during this budget year. They are only part way through the budget year. It couldn't have been actual.

Q And again –

A It would be projected.

Q Here the references are to the sudden cutoff of compensatory time usage. Would the same observation that you made with regard to Salt Lake City be applicable here insofar as you are saying that a matter of logic at least other things – let me start again.

As a matter of logic, at least, it would seem that compensatory time could result in the same cost to the city as payment of additional overtime if the figures [106] balanced?

A Let me reacquaint myself with his facts here.

Well, theoretically I think the statement I made before is probably adequate in general theory. Obviously I know of no one in the country that knows more about the application of this legislation than Bill Danielson does. He wrote that report earlier; and – that you cited, Exhibit 4.

Based upon that knowledge, he has concluded that for the city there is an additional cost. Exactly where that comes from, I don't know that I can explain; but this, I think, supports the statement I made earlier that they aren't going to balance out exactly. It is good theory, but it just doesn't work out that way all the time.

Q But you don't know why it doesn't work out?

A No, I don't.

Q Do you know what the total payroll is of the Sacramento – city of Sacramento? I don't know whether it is in here or not. I simply have not had a chance to read this entire document.

A No, I don't. Not without doing a little research on it.

Q [107] Now –

A Obviously I just can't carry all those numbers around in my head for that many cities.

Q Now with regard to Sacramento, there is a reference to the cost – in paragraph 53, there is a reference to the cost for the year beginning January 1, 1977. At least that's what it appears to say. By January 1, 1977, in order to meet the act's requirements on fire protection services, the city must diminish services or hire 16 to 17 additional fire fighters at a cost of $310,000 in 1974 firemen wages.

Do you know whether – let me start again. Does that imply that in 1975 there will be no additional costs for fire fighters in Sacramento?

A One thing about Bill Danielson is that he knows so much detail it takes a little while to get through it.

MR. CHARLES RHYNE: Look on page 4. I think if you look on page 4 in the second paragraph where he says, "Looking ahead to January 1, 1975 . . . "

I think you will see what he's asking about.

THE WITNESS: That deals with an administrative problem.

[108] MR CHARLES RHYNE: Oh, I see.

THE WITNESS: The 310,000 is . . .

I would assume that from the way he states this that there is a '75 cost, but he has not cited the exact amount.

BY MR. DODELL:

Q Well, given the – I am sorry. I didn't mean to interrupt your answer.

A It doesn't appear to be as significant to him as does the later cost, because he indicates here that their duty hours at present are 58, six gross and 56 net; and on a net schedule of hours of 54 hours a week.

See, that's for '77, isn't it?

Where did I – I am sorry. I am reading the wrong paragraph here.

Yes. Agreed to pay overtime over 54 hours. That's on page 3.

MR. CHARLES RHYNE: I am sorry. I guess I misled you then.

THE WITNESS: I can't give you a specific cost for '75.

[109] BY MR. DODELL:

Q Thank you.

A I am not going to guess at it.

Q Now in the case of paragraph 54, the only information with regard to Pasadena that's been alleged deals with 1978; that is correct, is it not?

A That's correct.

In fact, they indicate that there would be no increase in cost for '75.

Q And in the case of San Buenaventura, there the only reference is to overtime costs for fire personnel; that's correct, is it not?

A That's all they have referred to.

Q And there the average work week is indicated in Exhibit 16 as in paragraph 4, an average of 62.3 hours.

A Based on a seven-day work period. I don't know what that translates to in the cycle business, but apparently they calculated that because they show the '75 cost and the statistical compilation below at $72,700.

Q But it is correct, is it not, that the statute does permit a seven-hour work period – seven-day work period?

A That's right.

Q [110] Period?

A Cycle.

Q Period is what is referred to. 7-K refers to a work period?

A Right.

Q So here we are talking about an impact on San Buenaventura in 1975 that would result from the fact that San Buenaventura exceeds by 2.3 the 60-hour figure which I think your own – your survey and the complaint indicates is compiled with by 95 percent of the cities; that's correct, is it not?

A That's right.

There is one thing that is not clear in the calculations that show up in some of these tables. That is whether these hours include, again, eating and sleeping time or mealtime deductions or whether they don't. You cited that report this morning; and we did not have the chance to check that before, you know, accepting those numbers as valid.

I would like to know whether those – those 56 hours, for example, that were cited, and whether – and again whether this 62 hours is inclusive or exclusive of [111] that.

Q You don't know whether it is or is not?

A On that table, I am not at all sure.

Q Actually the table – the figure we referred to in the table was Los Angeles County, Mr. Rhyne corrected me.

A Yes. I am just pointing that out in throwing these hours around that we ought – that the impact has to be considered in terms of whether those are in or out.

Q Do you know in the case of San Buenaventura whether the 62.3 includes or does not include sleeping or eating time?

A Generally the hours calculated exclude sleeping and eating time. That's generally the way it is stated.

Q Well –

A It is the net.

Q All right.

When you – I assume that the National League of Cities or its counsel obtained this information from the cites that supplied it; is that correct?

A Yes. If they don't state it, if they don't state it, the normal assumption would be that it excluded [112] eating and sleeping time.

Q How would –

A That's normally –

Q How would you demonstrate that's the normal assumption?

A Well, it's just normally the way it is done.

Q Normally –

A Because – that's been the general practice. In calculating firemen's hours.

Q I thought you said you didn't have a great familiarity with the way firemen's hours were calculated earlier?

A I didn't say that. I said I didn't want to try to get into going through all those Xs and Os on schedules. I think that gets into a lot of mathematical stuff that I am not ready to get into here. I think the general practice is – the general practice is to calculate hours on net hours.

Q So it is your testimony then that this 62.3 hour figure is a net figure that excludes sleeping and eating?

A Yes. I think if you look at Danielson's figures, [113] I think maybe his – no, I guess his didn't. There was another communication that cited that more

specifically, as I recall; but if the eating and sleeping time is included as it is under the regulations now, the cost here would have to be assumed to be higher; but how much higher, I don't know.

Q All right.

A I would say this, as a result, is a low figure, not a high figure.

Q You don't know that of your own knowledge. That's an assumption you are making; is that correct?

A That's an assumption based upon general practice.

Q And you know the general practice to be the case?

A That's right.

Q Do you know if there was testimony at the hearings with regard to what assumption is made – do you know whether at the hearings any assumption was made with regard to the sleeping and eating time, and whether it is included or not?

A No, I didn't attend all the hearings. I wouldn't want to vouch for that.

Q [114] So according to your assumption, then, your assumption would be that San Buenaventura firemen are on duty a substantially longer time than 62.3 on the average?

A Well, it depends on what the definition of "on duty" is. I am saying that the definition as normally used did not include eating and sleeping time for this kind of calculation. Under the new regulations, you would be right.

Q You can't point to any place in writing where it is indicated that that assumption is made by the people –

A No.

Q Let me finish.

– either by the people responding or in terms of your inquiry to which they were responding?

A No.

Q Was there a letter that asked these cities for information?

A Not that asked for it in that way, that we – the request – the only indication was that any cities that had any examples of how they were going to comply or what the impact was going to be, they were asked to supply that; and these were supplied based upon their own [115] interpretations of the impact of the act, not according to any specific form.

Q Was this request for information by way of a circular or by phone calls?

A We didn't – some of it was direct by phone calls; some by communication; some by personal conversations.

Q There was no general letter sent your membership?

A No. Not to go through this with everybody. It – we didn't feel because of the nature of this case that it was necessary to compile a record on every municipality. Our view was the Constitution was violated if there was any impact, whether it was a dollar or $500 million.

MR. DODELL: Mr. Rhyne, if you would indulge me, I wonder if you would be kind enough to inquire of Mr. McHolme was that his assumption was 6200 was included or excluded?

MR. CHARLES RHYNE: Let me say to you everything that is in here, we sent to the city attorney and told him to check the accuracy. We didn't ask about anything like that. So there is no city here that hasn't been, [116] in effect, double-checked as to the accuracy

of what has been said here in writing and by their city attorney. We didn't ask that question.

Of course, I should also – you can take this off the record or on the record – we didn't use all of the cities that replied. We just used examples. We would give you a stack that would be rather enormous.

THE WITNESS: It would be longer than 68 pages.

MR. DODELL: Responding to that, we can only deal with what is before us.

MR. CHARLES RHYNE: I understand that. I want you to understand we selected some of them and not all of them.

MR. DODELL: I appreciate your mentioning that.

As I say, we can only deal with what is before us.

I do appreciate your undertaking to find out what assumption was made in that regard.

MR. CHARLES RHYNE: We will. We will find out with respect to Buenaventura. That's the one you are asking about?

MR. DODELL: That's the one I asked about.

MR. CHARLES RHYNE: I don't want to call them all.

[117] MR. DODELL: I think it would be a big burden to call them all between now and next Monday, which is the date of the hearing.

BY MR. DODELL:

Q In paragraph 56, Exhibit 17 was provided with regard to paragraph 56; and I note that according to the city manager of the city of Newark, California, at page 3, it is indicated that for regular personnel in the fire department, during the years 1975 and '76, the current manning level in schedule of the fire department personnel is adequate to meet the mandated hours.

That is correct, is it not?

A Yes, that's what he states in here on page 3.

Q I recognize that he deals with other impacts, but in terms of regular personnel of the fire department –

A Right

Q – he indicates there is no problem in '75 and '76?

A Right.

MR. CHARLES RHYNE: But I read Fair Labor Standards Act of 1974 would have an increased financial impact of $76,632.30 on the police department.

THE WITNESS: You are asking about the fire, [118] were you not?

MR. DODELL: Yes. I asked about the fire.

MR. CHARLES RHYNE: Excuse me.

MR. DODELL: I said regular personnel of the fire department. I said I recognized there were other indications in here.

MR. CHARLES RHYNE: Okay.

[119] BY MR. DODELL:

Q Again, though Mr. Rhyne, since you did bring that up, again here at page two, there is a reference to elimination of compensatory time, which accounts for a part of that amount, and I realize that is a $3,000 figure, but that again is something that we have dealt with before in regard to Salt Lake City and San Francisco, where we talked about the impact on the budget of the using – paying overtime instead of compensatory time.

I simply say that in regard to your observation.

Now – Mr. Pritchard, according to the figures here on page two with regard to reserves, and with regard to voluntary hours, it is true, is it not, that under the Fair Labor Standards Act, whether a person is a volunteer or

an employee is a question of fact to be determined in each case, and that volunteers are not required to be paid – genuine volunteers are not required to be paid in accordance with the Act; whereas if the employment relationship is determined to exist, then they are so required, is that right?

A My understanding is that there is a nominal compensation figure below which it is assumed that it is – [120] there is no compensation. That figure is pegged at $2.50 for a given period. In the case of – I believe that is only in the case of police and fire, or only volunteer fire department personnel.

I think this situation on volunteers is far from clear at this point, and what we have been told up to this point is that – and the only thing we can advise the city is that these are going to have to be dealt with one a one-to-one basis and the decision will be made by someone in the wage and hour division and not by local officials.

So, there is no way to know in advance.

Q And is it your understanding, Mr. Pritchard, that with regard to the Fair Labor Standards Act in general, every issue is determined in advance or ascertained in advance and that there are no issues that may require –

A Well –

Q Excuse me, may I finish?

– that there are no issues that require interpretation and ultimately may have to be resolved by the courts?

My understanding is that there are so many issues unresolved and unclear that the cities in trying to [121] comply with this are going to be in a mass of confusion for the next year, year and a half, and they are going to be subjected to – and abused by all kinds of legal attacks

and charges to pay penalties out of public funds, and personally without any intent to violate the law, but simply because it is impossible to interpret the regulations as they apply to local governments.

85 percent of that does not apply to local government officials, but they have to read every bit of it to know whether or not it applies.

(Indicating.)

MR. CHARLES RHYNE: By that, what do you mean?

THE WITNESS: Title 29, parts 500 to 1899. I would like to challenge anybody to go out and hand this to a city council or mayor of a city of 500 or a couple of thousand and tell them to sit down and read that thing when he works one evening a week or one evening every other week as a councilman, and sit down and digest that and tell what he has to do with his personnel to bring them in compliance with the law and avoid being subjected to severe penalties under the Act.

[122] BY MR. DODELL:

Q Mr. Pritchard, is it your opinion that a statute has to be clear in every application in advance of interpretation, in advance of court decision?

A I think that is a legal interpretation that I am not going to try to interpret. I have a personal opinion, but I don't think that is a legal opinion.

Q You volunteered some other comments. Are you unwilling to answer that question?

A I can interpret the practical problem of a city administration having to read through that and cipher out what does not apply and what does apply, and when we have been told by the wage and hour division that probably 85 percent of it does not apply, and when we

have asked questions about the fuzzy parts, every part – every question that has been raised we have been told that it will have to be interpreted on a case-by-case basis.

Now, where does that leave a – where does that leave local government officials in trying to determine where they stand under the Act? I am saying that the regulations are so voluminous, they have been imposed in such a short period of time, with so little opportunity to [123] understand – there is no publication of this kind for state and local government as it applies to state and local government officials.

The wage and hour division told us when we talked to them about this back in May, they said we don't have any problem. Everything in Title 29 is all there has to be, and you will be covered by it, and that will meet your needs.

There is no publication put out that can be handed to them and say this is what applies to local governments. They have got to go through that and cipher it out and try to figure out what applies. What is fuzzy they have to try to get specific rules on.

I am saying for the next year and a half to two years, there is going to be a mass of confusion which is going to completely disrupt 200 years of stylized operations, which has been a tradition at the local government level.

Q Mr. Pritchard, the prior amendments of the Act in 1966 brought under the Act – if my recollection serves me, three and a half billion – no, that can't be.

Well, let me put it this way: in 1966, there were amendments to the act that brought under the Act employees of hospitals that were run by states and local [124] governments, and employees of schools that were run by state and local governments.

Did those people manage to comply with the Act?

A I wasn't involved in the discussion at that time. And I don't know that I can cite the exact history, I do know that the number of units that were involved were very nominal, because most of the hospitals, only about 20 percent of the hospitals in this country are public hospitals, and most of those are operated while they are called municipal or public, are operated by special districts and not by municipal organization, and they are very specialized types of operations.

Q Do you by any chance know the number of employees who were brought under the Act, the 1966 – ?

A I don't recall offhand.

Q May I finish the question? The number of employees brought under the Act by the 1966 Amendments and the number who were brought under the Act as a result of the '74 amendments?

A I don't – no, I don't know under the 1966 amendments what that figure was.

Q Well, I would like to have marked as the next [125] exhibit, number 37, a pamphlet called "Nonsupervisory Employees in State and Local Governments."

(The document referred to was marked Defendant's Exhibit No. 37 for identification.)

BY MR. DODELL:

Q I would like to show you this, Mr. Pritchard.

MR. CHARLES RHYNE: That is 1971?

MR. DODELL: That is correct.

THE WITNESS: This is quite a volume. What did you want?

BY MR. DODELL:

Q I will ask you a question. I just wanted to show it to you.

A Okay.

Q [126] May I have it back? I want to ask a question about it.

On page 40, I would like to call your attention to a passage that reads, "State and local educational institutions and hospitals which are presently covered by the Fair Labor Standards Act, counted for 3/5 of the employment in both state governments and local governments."

Now, do you have any basis upon which to question that figure?

A Where is that?

Q I will show that to you. (Indicating.)

A Well, yes, I would have to question it as it applies to local governments because what this does is to lump into one pot all of the state institutional and state hospital personnel, which is a rather substantial number, I assume, with local government personnel, which is done quite frequently with state and local funds.

They have to be distinguishable to be meaningful from our standpoint. I can tell you that from our standpoint, from the standpoint of local governments, the control that the Fair Labor Standards Act extends to local government represents a federal control of between 80 and 85 percent of the local [127] budget, because most of the local budget is made up of personnel costs. And in effect, the Fair Labor Standards Act takes out of the control of the local governments and puts into the control of the wage and hour division between 80 and 85 percent of the local budget.

Now, what that amounts to in numbers of people, it does amount to a lot in terms of ability to perform to meet political responsibilities, to carry out programs.

Q I would like to repeat the question: do you have any basis upon which to question the statement there that –

A Yes.

Q Excuse me, may I ask the question?

MR. CHARLES RHYNE: He answered, yes. He told you why.

BY MR. DODELL:

Q Is it then your answer that you do have information that questions – that calls into question that state and local educational institutions and hospitals which are presently covered by the Fair Labor Standards Act accounted for the 3/5 of the employment in both state and local governments?

A Yes, because – I am saying yes, I have reason to [128] question it. It doesn't mean anything to me.

Q But you have no basis upon which to question that factual –

A Certainly –

Q May I finish, Mr. Pritchard?

Do you have a basis to question that factual statement?

A Yes. I could pull the figures out of the census data, if I had time to do it. All I'm telling you at this point is that federal figures have a constant tendency to lump state and local sutff together; and when you lump the state educational institutions and the state correctional institutions and hospitals into one pot with local government personnel or local government budgets,

either way you distort the picture by the way it's weighted; and it is not an accurate picture in representing the case that we are trying to represent.

Q And you have factual information that –

A I can provide factual information.

Q Let me finish.

You have factual information that would contradict this?

A [129] I could provide it. I couldn't cite it out of my head. I could provide that.

Q When could you provide that?

A I know it can be provided. It would take just a relatively short period of time to dig that out.

Q Could you provide that to us, please?

A Certainly.

Q Fine; thank you.

MR. CHARLES RHYNE: Mr. Dodell, we do have these exhibits of the United States Department of Commerce. I don't want to stop you and start plowing through them – that really give a figure of 11 million for all state and local employees; and then they break it down in here, and then Harrison Williams says there are 7 million new workers covered in under these new amendments.

There are so many numbers that are bandied about, that I would really think, though, that these later figures on employment put together by the census people would give a different picture from that.

I don't want to stop him or you to go through them. We will give you these exhibits for what they are worth if you want them.

[130] MR. DODELL: Mr. Pritchard said that he could provide the information that would show this is not the

case. I would be very interested in seeing those figures.

MR. CHARLES RHYNE: I would like to get that from you so he will know what he is working against.

MR. DODELL: Yes.

BY MR. DODELL:

Q Do you have a figure as to what percentage of the employment in local governments was covered by the Fair Labor Standards Act prior to the the 1974 amendments?

A I don't have a specific figure. It was a very, very low figure, because it – in terms of hospitals, as I indicated, most of the hospitals are not municipal hospitals. They are – while they are public, they are special districts; and they are not under the control of city governments and they are not part of the city government employment figure as a result.

So it would be – I would guess it would be a fraction of a percent.

Q A fraction of one percent?

A A fracton of a percent, maybe 2, 3 percent; something like that. I would have to look that figure up, to [131] be sure. My estimate would be very small.

Q Just so I understand your testimony then, it is your testimony that only 2 or 3 percent of – excuse me, of local government employees were covered by the Fair Labor Standards Act prior to the 1974 amendments?

A I'm talking about municipal employees.

Now, if you call special district employees local government employees, then a larger percentage of them would be in that category, because all hospitals – special district personnel are included under that. That brings that percentage high.

I'm talking about – we are talking about cities and the people that this complaint represent. (Indicating.)

This represents cities. Most of those hospital employees are not city employees.

Q All right. So you're excluding from what you are talking about state employees and you are excluding special district employees?

A That's correct.

Q Are you excluding county employees?

A From this – our complaint does not deal with counties. They will be similarly affected.

Q [132] From your 2 to 3 percent figure, are you excluding county employees?

A I can't speak for the county figure. We don't deal with the county in that respect. I would have to make a calculation on that. I don't know.

Q What is the 2 or 3 percent? You use the 2 to 3 percent figure.

A There are a few municipal hospitals. I said when you take the nunber of people employed by those municipal hospitals that were covered, they would be a relatively small fraction of municipal employees.

That's why they would be small. I think the mathematics are rather obvious on that.

Q The 2 to 3 percent – you are saying – I still don't understand your answer. Does the 2 to 3 percent include county employees or not?

A No.

MR. CHARLES RHYNE: He said he couldn't answer.

THE WITNESS: I don't know what the ratio in terms of counties would be.

BY MR. DODELL:

Q I just don't understand your testimony, Mr. [133] Pritchard.

A I will try to restate it.

Municipalities operate very few hospitals. In most cases hospitals are operated by special districts as was indicated at the time the '66 amendments were passed. About 80 percent of the hospitals are private hospitals. 20 percent are public.

Of those 20 percent, very few are municipal. Consequently, when you take the very few that are municipal and relate the number of employees they have that were covered under the Act and relate them to the total number of municipal employees, the percentage is very small.

Q You are aware that employees in educational institutions were also covered by the Act?

A But educational institutions are generally not municipal employees either.

Q So then it's your testimony that this 2 or 3 percent figure you are talking about relates only to municipalities and not to counties or special districts or states?

A That's right.

Q And do you have a numerical figure for how many employees there were?

A [134] I said I would be glad to try to dig that out for you. I don't carry it in my head.

Q Do you know whether the states and the special districts and the counties and the cities to the extent of the 2 to 3 percent of employees, were able to comply with the Act after the 1966 amendments?

A I assume they have.

Q Even though there are a whole lot of regulations

that apply to them?

A I assume they have. I am not sure what the time constraints were in that application, however. They may not be comparable.

Q You think it's more difficult for a municipality to comply than for a small businessman to comply?

A I think probably it is. There are a whole host of reasons for that. I think it is.

Q It's more difficult for Los Angeles to comply than an employer of 5 or 6 or 7 employees?

A Yes.

Q And that's why the Act will visit irreparable injury – that's one of the reasons that the Act will visit irreparable injury upon the municipalities?

A [135] I think that's one of the reasons.

Q Now, for the city of Montebello, which is referred to in paragraph 57 of the complaint and is represented by – excuse me, you provide information that's included in Defendent's Exhibit No. 19; your verification with regard to paragraph 57 rests entirely upon Exhibit 19; is that correct?

A That's right.

Q Do you know how the average number of hours which the firemen in Montebello, California, worked in 1974?

A Well, he cited in here they were scheduled on a 56-hour week.

Q And we have earlier indicated – or you have agreed, have you not, if employees were scheduled on a 56-hour week, and they chose the proportion, then they would not incur any – any additional overtime expense under the Fair Labor Standards Act Amendments?

A No, I didn't.

Q I thought that you did indicate that?

A No, I didn't.

Q Could you explain that?

A I think I testified that the – that it depended on the work period that their hours were scheduled. They [136] could be working a 56-hour – what they call a 56-hour week, now, which was on a cycle or a work period arrangement that did not fit the regulations; and in order to come into compliance with the regulations, they still might end up keeping a 56-hour week, but it would cost them more money.

Q Didn't we discuss Exhibit 3 and it told if you had a 6-hour work week, you could adopt a work period and a tour of duty that would result in no overtime cost?

A That isn't the way I think it's understood.

Q Well, I would like to look at Exhibit – I think we keep coming back to this. That's how I understood the testimony earlier.

MR. CHARLES RHYNE: That wasn't my understanding.

THE WITNESS: If they are working a 60-hour week under a certain cycle situation they can change over to one of those options and not have it cost them any more.

If, however, they are working a 60-hour week on a cycle other than those that are cited in Exhibit No. 3, and have to change to come in with those two options, then it can cost them more money.

The report states that very specifically.

BY MR. DODELL:

Q [137] What was there to stop any municipality from converting to a work cycle that would result in no additional overtime cost?

A For example, the State of Texas mandates by state law that the cycle be 365 days. The cities in Texas are complying with State law. In order to change to the 7-26 day cycle, they have to change to a different system.

Q Is the city of Montebello –

A The state of Indiana has a mandatory cycle.

Q Is the city of Montebello subject to any restraint that would prevent – is the city of Montebello subject to any restraint that would prevent it from adopting a cycle that would result in no additional overtime cost?

A I don't know what that cycle is right now. If they are working on a 2-day cycle and have to move to a 7-day cycle, or if they are working on a 6-week cycle instead of a 26-day cycle, and have to move back to a 27 to 28 day cycle, then it could cost them – it could result in increased costs.

Q How could it result in increased costs?

A Well, I think that is explained in Exhibits 3 and 4.

Q I think – well –

A [138] I cited that to you.

Q Could you show me?

If we could find – here it is.

If you could look at Exhibit 3, I wish you would show me how that is explained in Exhibit 3.

A Look on page 3, under the heading, "Avoiding Unnecessary Fire Overtime."

"Even though this cycle is equivalent to an average of 56 hours a week, a city that maintains this particular cycle beginning January 1, may be liable to pay unnecessary overtime every 3rd week."

Now, that – so that cities that were in that – in those cycles had apportioned their manpower in such a way as

to have a 58 or 60-hour week and come out with a 58 to 60-hour week.

When they try to switch back to comply with these cycles, they end up having to add manpower to do it.

Now, that's a very technical thing to work out. I am not a personnel director. I am not a technician to do it; but I know that that is the fact. That is why these numbers are showing up in all of these, because everybody is experiencing that.

Q [139] Well, I asked you to explain that, Mr. Pritchard, because it seems – on the face of Exhibit 3, the passage that you read said that if a city has a cycle that is equivalent to an average of 56 hours per week, it may be liable to pay overtime; and then the example is given in the text.

However, the text on the preceding page gives ways in which a 60-hour average can be accomplished without any overtime liability.

Now, I wish you would explain to me how it can be that a municipality could have a 60-hour average and not increase its manpower and have a 56-hour average and increase its manpower?

MR. CHARLES RHYNE: Do you understand that question?

THE WITNESS: It's a very complex subject, and that's why you end up with charts like this to try to sit down (indicating) – you have to take a calendar and sit down and do it in x's and o's in order to figure it out.

As I have said, I am not a personnel director. It's not my job to sit down and work these out this way. All I can tell you is that when you put this in the hands of a [140] city manager who has to administer it, and he applies it

to his current schedule and comes up with a number and says, "This is what it's going to cost me," you have no reason to doubt but what he's telling me the truth.

You and I can argue about that in theory, but the practical matter is that city manager has to apply it and he is interpreting the statute and the rules and the possibilities as he understands them; and that's what his city is going to make its budgets on, and that is what he is going to levy his taxes on.

Q How do you explain the passage on the top of the second column on page 3, that says this kind of unnecessary overtime can be avoided by adopting a fire duty cycle at least 7 days in length, and not exceeding 28 days in length; specific examples of duty schedules that can be adopted are listed in Table 1.

How do you explain that?

A Well, they are saying here if you are within 60 hours, they have given an example of a 24-hour-on and 48-hour-off cycle of a 56-hour week. And if you are within the kind of cycle that they have illustrated, and make the change that they say, you can avoid overtime.

[141] I am saying that if you are on a different kind of a cycle, if you were on, like a Texas city with a 365-day cycle, or a 2-day cycle, and have to move into a 7 to 28 day cycle, you can end up having to have additional manpower to man those shifts.

That's where the extra costs comes in.

To move from – to illustrate that would take – would have to take a hypothetical situation and work it through in a hypothetical way, and produce an answer which would require going through a whole series of calculations like this to do it.

The communications that we have here indicate from cities who have worked through this, that they have tested it and according to their calculations, based upon what they know of the Act and the regulations, that's what it is going to cost them.

I have no reason to challenge them.

Q Can you give me an example –

A You are trying to challenge me on their data. I am saying their data, I think, is valid and acceptable.

Q Can you give me an example of any of the information that you have provided that indicates that if a city follows [142] what this bulletin speaks of to avoid unnecessary overtime, it will have to add additional manpower? Is there any example here that you can cite us to that would show that?

MR. CHARLES RHYNE: Well, Mr. Dodell, this pamphlet you are referring to is something written by the International City Management Association and put out last June 1974. An awful lot has happened since then; and he doesn't vouch for the accuracy of this report and all of these charts and everything in it.

I think you are asking a very unfair question to try to go from the generalized statement here to something specific.

He's said that he's given you the information from the people who have it about the estimated increases. I don't see how you can expect him to do more.

THE WITNESS: I will give him his answer.

MR. DODELL: Can I reply to Mr. Rhyne, please?

Mr. Rhyne, this report was prepared by William F. Danielson, Director of Personnel for the city of Sacramento, whom Mr. Pritchard did say, in Mr.

Pritchard's judgment, knows as much about the Act and its interpretation as anybody.

MR. CHARLES RHYNE: It speaks of June 1974, a [143] long time ago.

MR. DODELL: I hate to debate things that can be debated in other forums, but what this pamphlet did was it made – the assumptions made in this pamphlet were that the Department of Labor would take the most rigorous view as to the strict application of the provisions; and even making those assumptions, the report said that you could take this 24-hours-on and 48-hours-off, and you could reschedule it so there would be no additional overtime cost.

What I would like to know, is where does it say here, or where does it say anywhere, that yes, but if you did that, you would have to put on extra people?

I simply don't know that that's the case. Logically it does not seem to me to be the case.

THE WITNESS: Look on page 6, at the bottom of page 6.

There is no way to have a 58-hour cycle in a 7-28 day work period. It requires you to reduce that to 56 to make it work.

BY MR. DODELL:

Q Where are you reading from, Mr. Pritchard?

A Bottom of page 6, 1976 requirements for fire [144] overtime.

Within the 24-hour fire duty period, the 10-14 period, or the 9-15 period, there are no fire duty schedules possible that are equivalent to 58 hours, using a cycle of 7 days through 28 days.

The next lowest fire duty schedule possible

arithmetically between 7 days and 28 days is a 56-hour average schedule.

The practical effect of the law enacted by the Congress is to require a 56-hour schedule starting in 1976 rather than 58.

So that even now in order to maintain that schedule, in order to – if you are under 60, in order to work the shift schedules that are required, you have to – a city like Montebello is going to have to change its work schedules and is going to have added costs.

Q All right.

Mr. Pritchard, what this refers to is the 1976 requirement and it references the 58-hour work week?

A Right.

Q [145] If the work week is 60 hours is it still your position that if the schedules are revised in accordance with the suggestion in this pamphlet that while you may reduce additional overtime, you have to add additional manpower?

A Say that again?

MR. DODELL: Why don't you read the question back?

(The pending question was read as requested.)

THE WITNESS: Yes. It depends on what you are moving from and what you are moving to.

BY MR. DODELL:

Q Can you give any example or any documentation to show that that is the case?

A I would be glad to have – work it out and give it to you on another sheet of paper. I don't think I can sit down and work it out for you here now.

Q Would you undertake to do that?

A Sure.

Q Fine. Thank you.

MR. CHARLES RHYNE: Will you make a note of that so we will furnish it?

MR. DODELL: Mr. Rhyne, let me ask you a question, [146] not as a witness but because we have an ambiguity in the record.

Here we talk about a 58-hour per week work schedule in Exhibit 19 on the second page, and again according to Mr. Pritchard's testimony, this would exclude – or his assumption would be that this would exclude sleeping and eating time, and we have an ambiguity here.

I wonder whether it would be too much for you to try to resolve that?

MR. CHARLES RHYNE: Well, we will call and ask them, but I think you will see that – no, Rick, make a note and call Montebello, the City Attorney, we always deal with the lawyer rather than the city administrator.

We will ask him whether it includes sleeping time or not.

MR. DODELL: Fine. Thank you.

BY MR. DODELL:

Q Now, with regard to Exhibit 21 and 22, relating to Menlo Park, California, am I correct that the basis of your verifying paragraph 58 is limited to these two letters?

MR. CHARLES RHYNE: The things that are written down on the complaint here are 19 and 20.

[147] MR. BACIGALUPO: Those are the old ones.

MR. CHARLES RHYNE: Oh, okay. I am sorry.

THE WITNESS: I am sorry. This is paragraph 58 you are referring to, right?

MR. DODELL: Yes.

BY MR. DODELL:

Q Now, there is a pending question, Mr. Pritchard.

MR. CHARLES RHYNE: You asked him whether or not his information was based upon these letters?

THE WITNESS: I answered that question.

BY MR. DODELL:

Q And then I take it that you can't explain this $120,000 figure with any more precision than the statements in these letters?

A No. I think that is quite adequate.

Q Just for the record, with regard to paragraph 61, and the allegation in the complaint dealing with the additional overtime costs in its fire department, this relates – this results from the statement or is documented by the statement in page two of Exhibit 25, that speaks of a 63-hour work week for firemen?

A Yes, right.

[147-A] MR. DODELL: May we go off the record for one moment?

(Discussion off the record.)

BY MR. DODELL:

Q Let me ask a general question, Mr. Pritchard: In a number of these, for example I am looking at Sumter right now, Exhibit 26, relating to paragraph 62 of the complaint, again there is a reference to compensatory time, and without repeating the discussions that we had previously and what you said and what I said with regard to compensatory time, it would be applicable to all of those instances in which compensatory time is referred to, would they not?

A Yes. I have been giving that some thought. If I

could explore that a little more, I think I have figured out why this works out the way it does.

When you have to pay a person time and a half within a given pay period, you lay out the cash at a time and a half rate. When the person takes time off, he takes time off at a slack period when he does not have to be replaced and he is paid at a steady rate, and I think that the difference comes in that – in having to pay and also pay [148] him full time during – you know, during the regular time.

You are really doubling it up. That must be where it is – where the extra cost is coming in.

Q But the point, Mr. Pritchard, is that you can pay the person for a short week. There is nothing to stop paying the person for a shorter week during a slack period of time.

A If it is – well, I don't know whether that works out or not.

Q To take a hypothetical, suppose you pay the man time and a half for 15 hours. Then you would simply have the man work – and I am just throwing out this number, let's say – 22 and a half hours less during the summer months, to use the Salt Lake City example.

You are paying the man only for the 18 and a half hours during the summer months.

A Under the regulations you can't carry it over.

Q You are not carrying it over. You pay the man the time and a half in the winter months. Let's say the man worked 50 hours, you pay him – let's say he made $2.00 an hour. You pay him for the 40 hours.

That would be $80. Then you pay him for 10 more hours; that would be $100, and then you pay him $5

more [149] that would be $105.

He would have earned – he would have worked 10 extra hours.

Well, if during the summer months you then work him let's say for the – just as an example, 30 hours, and you pay him for 30 hours, you would be paying him $60 in the week in the summer months.

The total for the two weeks would be $156, and he would still be paid time and a half for the week he worked.

Now, obviously, here he would be getting $5 more than he would have gotten, but you could easily adjust the hours so instead of 30 hours, he would work 28 hours or whatever the adjustment would be, and the total cost to the municipality would be exactly the same. It is just that it would be laying out the money immediately and then paying less later.

Isn't that correct?

A I would have to draw that out.

MR. CHARLES RHYNE: I would be rather hesitant to make out that man's income tax return.

MR. DODELL: We could go through it again. It just seems to me this is what you were saying earlier.

[150] THE WITNESS: We probably ought to try to clarify why that comes out the way it does. Obviously, everybody that has figured it says compensatory time off – the lack of compensatory time off is going to cost them more money.

We can theorize that it will balance out. Everybody that has looked at it has come up with that conclusion. There is a reason why it is coming up that way.

BY MR. DODELL:

Q But the reason doesn't occur to either of us in any event. Isn't that true?

MR. CHARLES RHYNE: You are not making out these income tax returns either.

THE WITNESS: That is why I am saying – you know, the thing that we don't recognize, or fail to recognize is that there are 15,000 individual units of government out there who operate the way the people in those communities feel they operate best, and they have developed a whole series of arrangements to carry out their functions.

When you try to slap a uniform procedure on all of them, everybody that has ever tried to write a model national code has written one of them and has never written [151] another. They always end up saying you can't write model codes.

You can't put everybody into these stereotypes. You can make recommendations, but when you start putting them all in that same straitjacket, you are going to find they all have so many different arrangements that it is very difficult to generalize and to conclude that there will not be an impact you can't anticipate.

There are too many varieties out there.

Q But at the same time, Mr. Pritchard, it seems to me in your thinking about it and my thinking about it, we haven't come up with a reason that the government would wind up spending less under either method.

A I don't see that it is necessary for us to come up with a reason. These people that are administering it have calculated it based upon their knowledge of their local situation and their knowledge of the Act and have said that is what they come up with, and I don't know why –

whether you and I rationalize a justification for it, whether that makes any difference.

We can say they come out even. The fact is they don't come out even. There must be a good reason for it [152] according to their local situation why they don't come out even.

Q There may be a reason for it but you can't think of it?

A I don't know it is necessary for me to think of it.

Q The answer is you cannot think of it?

A I don't know offhand in each one of these situations.

Q In any of the situations?

A There may be a different reason in each one.

Q You can't think of a reason in any of the situations? Can you?

A I don't know. I probably could sit down and figure out some reasons for it, but I don't know that it adds anything.

Q Well, but I mean –

A It is not factual, it is a guess if I do.

Q You verified the complaint. It seems to me that it is pretty clear that the complaint says it would cost a lot of extra money if compensatory time were used. And we have been here now since 10:00 this morning, and you must [153] have thought about this before now. You can't come up with a reason that would explain why it doesn't come out even; is not that right?

A I verified in the complaint a set of facts. I don't know that it is necessary that I go behind every one of those facts.

Q You are assuming that what the city said is right?

A That is right.

Q But you can't explain why it is right?

A No. Not in all cases.

Q Not in any case dealing with compensatory time, isn't that right?

MR. CHARLES RHYNE: That is not true. He hasn't gone through each one of these with respect to compensatory time. We have done it with respect to Salt Lake City. That is about the only one.

MR. DODELL: I think we did it in the case of one or two more besides Salt Lake City. Then I was trying to ask the general question so I wouldn't have to go through it in the case of each one.

BY MR. DODELL:

Q [154] Is there any instance where we are talking about compensatory time where you can explain the reason why it doesn't come out even?

A Not from specific knowledge of a specific situation, no.

Q Now, in the case of Randolph, New Jersey, which is Exhibit 29, is it correct that the information relied upon to support paragraph 65 is what is contained in this exhibit?

A Yes.

Q Now, as I read this letter, there is nothing in it – in the exhibit that itemizes the number of employees who are referred to and the specific instances in which this impact on staff of volunteer boards or commissions will occur; is that correct?

A No. There are not. I think the intent of this is to demonstrate a different kind of impact than that which is cited in many of these others, which are all in dollar

terms.

This indicates that the imposition of this particular legislation disrupts a traditional way of conducting the business of the local government through the [155] utilization of lay members of boards and commission. It will force many of these to change that way of doing business, in effect, either abolishing the boards or commissions or increasing the costs in order to carry the personnel.

Q Well, the reference here is to full-time employees serving as secretary or staff for volunteer boards or commissions; is it not?

A Yes, there is a reference to that in paragraph one, I believe.

Q Paragraph four, isn't it?

This is Exhibit 29 that we are talking about.

A Yes, this is the one that refers to staff for boards and commissions, isn't it? That is right. This is on staff to boards and commissions, not boards and commisions themselves.

MR. CHARLES RHYNE: Dual employment.

BY MR. DODELL:

Q What I am asking is there is nothing here specifically that states the situations that have arisen?

A No.

Q With regard to Exhibit 30, and paragraph 66, am I correct that what you are relying upon to support paragraph [156] 66 is this letter that is Defendant's Exhibit 30?

A Right.

Q And this letter, does it not, merely states in summary form the conclusion that because of the

elimination – and I am paraphrasing – because of the elimination of compensatory time there will be an estimated annual expenditure of $100,000; is that correct?

A That is correct.

Q [157] This letter says, does it not, the fiscal impact outside of the public safety area for the City of Phoenix is relatively minimal inasmuch as the city has adopted a number of premium pay practices similar to private industry for a number of years?

A Yes, that is right.

I think it should also be noted in there, something that hasn't been referred to in the other communications, that although they have been referred to in the documents, is that there is going to be a substantial administrative cost also imposed. One of these cities indicated that it was going to have to not have computer capacity available; it was going to increase its record keeping. This one indicates it is going to have to review its job classification of individual positions for coverage under the Act. There are impositions of that kind that go all the way through this. These are burdens. Many of these will not be able – because of that time constraint, and because of the complications at the local level of bringing those changes about through public hearings and in some cases amendments to civil service statutes, perhaps even state legislation to bring them into line is something that local units are not going [158] to be able to come into compliance with immediately. That is why I said this public sector is very much different than the private sector. The board of directors of a private corporation can meet and say, "We have to comply and instruct the

staff to comply." When you have to do it through a public decision-making process with citizen participation and complying with state statutes and go through all those hearings and amendments of ordinances that require notice and so many days between readings and so forth, local units are going to have a much more difficult time coming into compliance. They are going to be subject to penalties in the meantime.

Q And was this different for state governments and special districts and counties and municipalities to the extent that they were covered by the Fair Labor Standards Act of 1966?

A I would assume that in some respects they were the same. They may have been different in some. As I indicated earlier, I don't know what the time frame was that we are working with. We are working here under about a six-day notice. As far as I know, there is no plan to provide copies of these regulations to 50 states and 15,000 [159] municipalities and 3,000 counties in the next seven days. To expect them to come into compliance in that period of time is absolutely unreasonable if not impossible.

Q Mr. Pritchard, the Act itself was adopted on April 8, was it not?

MR. CHARLES RHYNE: Signed.

THE WITNESS: It was signed.

BY MR. DODELL:

Q It was approved on April 8, was it not?

A Right.

Q Is it your understanding that it took the regulations in order to require the states and local bodies to come into compliance?

A I cited at one point I used to work on Capitol Hill. I remember Senator Muskie saying one time, before a hearing, that he would work his fanny off all through a piece of legislation, send it from the Hill down to be signed and into a federal agency; and when the regulations came back up, it was 180 degrees different from what it was when he sent it down. The local government people have lived through this so long in so many frustrating experiences, to move to implement legislation only to find that the regulations are [160] so much different than they ever expected them to be. You cannot get local government people to move effectively to comply with the details of the law until they have seen the administrative regulations. If I was in that position, I wouldn't and neither would you.

Now there is an awareness that this is going on, but no sane political leader at the local level would go to his people and propose changing work schedules. Every time you try to open up a civil service law at the local level, you are charged with political power grabbing. Every time you start trying to change salaries, you are charged with trying to increase the budget to play favors.

No sane political leader is going to face all of those retributions that go along with that until he knows exactly what he is going to have to deal with and he will have to defend it. As long as these regulations have been as fuzzy, as unavailable, and interpretation as confusing as they are, and nothing firm on the line until the 20th of December for regulations that have to be administered on the 1st of January, it is absolutely unreasonable to expect those people to move to that degree of compliance where, within seven days, they can bring this thing into

line. There is no [161] way it can be done.

Q Mr. Pritchard, you stated earlier, did you not, that the states and local bodies try to come into compliance with the provisions that came into effect on May 1, 1974?

A They tried. They are citizens. They are elected representatives. The success of their jurisdictions is to demonstrate compliance with the law. Obviously although they will differ with the law and will test its constitutionality, the general practice is to try to comply as reasonably as possible, but you can't comply when you don't have the instructions under which you are going to function. Those instructions will not be available to them.

Q They have tried to comply with the provisions that were effective May 1; is that correct?

A I think there is every evidence that in good faith they have tried to proceed. Many of them we are very much afraid are going to be challenged on the lack of action simply because there was no way for them to be aware of all of the implications of this legislation as it applied to them.

Q Well, and yet we have discussed Exhibit 3 which indicates that the National League of Cities was aware of [162] problems that you have talked about with regard to scheduling of work week –

A I am sorry –

Q Excuse me.

They were aware of problems that existed with regard to scheduling of work weeks since June of 1974?

A As was just cited here, if you proceed on the assumption that under the regulations that go into effect

on January 1 that sleeping and eating time is not going to be included in work hours, you can assume that you are in compliance with the law and you are not going to have to make any change, and the case has been argued here up through hearings in November of this year, still anticipating that there was a possibility that the regulations would exclude sleeping and eating time. There were discussions going on at the White House as to whether the Executive Office would intervene in that interpretation, and why would anybody in their right mind move out to start recruiting people and changing their budgets and levying new taxes and cutting out other programs and reshuffling priorities as long as that issue was that much alive? That would be absurd on its face.

Q Well, Mr. Pritchard, I think that the Exhibit 3 [163] indicates that – correct me if I am wrong – or let me put it this way.

We can go back again to Exhibit 3, and Exhibit 3 indicated that if a locality had a 60-hour work week, there was a way to schedule it so that the municipality would be liable for additional overtime and there was a way to schedule it so the municipality would not be liable for additional overtime, and these options were known to the National League of Cities, your organization, in June of 1974?

A And I am pointing out –

Q Is that correct, first, Mr. Pritchard?

A There was no way to advise anybody at that point nor has there been any way to advise anybody up until the 20th of this month how they could count hours for work.

Now I would not in my right mind tell a city to

proceed with its budget and to tell a city to start recruiting personnel. What you fail to understand is that on January 1 you are supposed to change from what you have had to something new with fully manned fire stations, full complements of personnel, and you don't go and recruit people overnight, nor do you go out and start staffing at $25,000 a man on the assumption that something is going to happen. When you are [164] dealing with tight local budgets and you are starting to lay off 7,000 people, like the City of New York is, you don't go out and start adding your force on the assumption that regulations may do this. You don't do it until you have got it in hand and you know what you have to deal with.

That just is not a rational way to proceed.

Q Can you answer the question, though: That as of June 1974 a city with a 60-hour work week could have known and that the National League of Cities did know that if it used a 60-hour work week one way it would be subject to additional overtime, and if it used it another way it would not be subject to additional overtime?

MR. CHARLES RHYNE: Don't answer that. He has asked that question many, many times. He knows the regulations interpreting this were not out in June 1974. He knows that no one could even dream what those regulations would be then because there had never been any such regulations on a federal level ever. So under all of those circumstances, as he said over and over again, there is no way that city officials could have, in June of 1974, known what these regulations that were issued on December 20, 1974, were going to contain.

[165] MR. DODELL: Are you finished?

MR. CHARLES RHYNE: No.

You just have talked about this June 1974 bulletin that went to a very few people ad infinitum, but it is a very speculative conjectural thing. There were no regulations at all. There was nothing on which to base the speculation.

MR. DODELL: Well, Mr. Rhyne, if you want to make your argument here, that is fine. I will reserve mine for the court.

MR. CHARLES RHYNE: You have been making yours all day. I thought I would just point out how wrong you are. You are asking all your questions based on something that is not relevant at all because there were no regulations in existence.

[166] BY MR. DODELL:

Q With regard to paragraph 67 of the complaint, and this is Defendant's Exhibit 31, the allegation of the complaint is that the Tulsa, Oklahoma, estimates additional costs in its fire department at $126,700 for 1976, and $380,600 additional costs for 1977. Do you have any information that there will be additional cost in 1975?

A No.

Q Let me ask you this, Mr. Pritchard: In paragraph 4 it states the city of Tulsa fire department now works a 240 hour work month. Do you have knowledge whether this includes or does not include sleep time?

A Not specifically. Again I would rely on the same assumption that I made earlier.

Q You assumed that it excludes sleeping and eating time?

A Yes.

MR. DODELL: Off the record a moment.

(Discussion off the record.)

BY MR. DODELL:

Q With regard to paragraph 68 of the complaint, am I correct that Defendant's Deposition Exhibit 32 is [167] what is relied upon to support that paragraph?

A Yes. That's right.

Q Do you know how many hours per week policemen in Sunnyvale averaged in 1974?

A Sunnyvale happens to be a city that operates with a public safety team. They do not work with policemen and firemen. They work with a combined department. It is an entirely different kind of a setup that operates in most other cities.

Q Do you know how many average hours a week the public safety people worked in 1974?

A No, I don't. Because it is a very specialized situation and works in a very – Sunnyvale, Oakwood, Ohio, there are half a dozen cities that operate with these combined types of departments. They have a very peculiar type of shift arrangement. There is no way to bear all of those in mind in detail.

Again I would have to rely on the fact that this is a very progressive city that has led in many administrative changes; and they are quite aware of what's going on. They have made this analysis. I would assume that their information is correct.

Q [168] Do you have any additional information as to how they calculated these figures that are stated in this exhibit?

A No.

As I indicated before, I don't know that it has been

necessary for me to go behind every one of these calculations and justify them. You know, we do this all the time, whether it is testimony on the Hill on the water pollution control costs, or urban mass transit operating subsidy needs, or whatever it is.

We make surveys, we gather the data; we rely on the caliber of the input; and we have found historically that it's been sufficiently reliable to be counted upon.

That's what we base our reputation upon. It's been acceptable in the past. I see no reason why I shouldn't count on this.

Q You don't know how these figures were arrived at?

A No.

Q Thank you.

Now in the case of paragraph 69 of the complaint, Defendant's Exhibit 33, this indicates that the city of Corcoran, California, has an 84-hour duty week; [169] is that correct?

A That's right.

I would point out in the case of the city of Corcoran this type of situation is not atypical of cities with small-time fire departments. The practice is to have one person on duty. That person eats and sleeps and just mans the station.

All he does is sit and take care of any emergency calls that come in; and advises the rest of the volunteers as to where the fire is when they call in for it.

So typically around the country, with five men, whenever you see a five-man department, what you have is usually people working 12-hour shifts with one spelling. Or 24 hours and one spelling.

In small communities, this is a rather typical situation.

The position is generally looked at as a very favorable and desirable position. The guy usually acts as secretary of the volunteer fire department, and it is as much a social activity as it is a business activity.

So when you see an 84-hour situation in volunteer fire departments, the way you and I look at it in terms of a 40-hour work week, it seems completely out of step with our [170] times; but it is a very real situation in most small communities around the country.

Q And this department has five full-time – paid full-time personnel and 17 volunteer personnel?

A That's a typical arrangement.

Q Does this 84-hour duty week exclude sleeping and eating time?

A In this case, I am sure it would include eating and sleeping time. Those people usually come on and stay right through for 24 hours. Sometimes the man will be on duty even longer than that. They practically live there. In small towns it is unbelievable the variety that you find. You find some small towns where a person goes on duty and stays there all week. He just goes in and lives. These are the kind of arrangements they make; and when you try to fit them into the kind of mold we are talking about, it is completely foreign to their way of doing things.

Q Why is it that if the assumption is generally that sleeping and eating time is excluded, the city of Corcoran is including it?

A I say when you get down to these five-man departments, five-man paid departments, when they are [171] talking about an 84-hour week, I can tell by looking at that that they are talking about that man being

on duty probably 24 hours, two or three days a week, three days a week. And they switch off.

Q Isn't it common in the case of a number of departments that people are on 24 hours straight?

A But – all I can tell you is from working with these – I used to go around and meet with volunteer fire departments and help train them; and eat their raw hamburger sandwiches with onions and beer, and I just know from having worked with them for so long that that's the way they operate. That's what that would mean.

I can just interpret it for you. I know that's what that would mean.

Q Just looking at this, you know that the 84 hours includes sleeping and eating time –

A I am sure –

Q Excuse me. Let me finish the question.

Just looking at this, you know the 84 hours includes sleeping and eating time and looking at the others, you know the figures don't include sleeping and eating time?

A That is my interpretation of it, yes.

[172] MR. CHARLES RHYNE: Can we go off the record for a moment?

(Discussion off the record.)

BY MR. DODELL:

Q In the case of Columbia, South Carolina, is it correct that the information that you have relied upon in verifying paragraph 70 is Defendant's Exhibit 34?

A That's right.

Q And the allegations of paragraph 70 make no reference to any increase in 1975 in its fire protection salary budget. The only reference in the paragraph is to

paragraph – is to 1976. At least the only specific reference to any dollar amount.

Is there any indication as to how much, if anything additional, the amendments will cost Columbia, South Carolina, in 1975?

A No. I think they have indicated that there will be some overtime compensation, but it will not be a major item in this year. It is the next year that becomes critical for them.

Q Do you know what the work week is in Columbia, South Carolina, for firemen?

A [173] Not offhand.

Q Did you know it at the time you verified paragraph 70?

A No. I don't know that it was necessary for me to know it.

MR. CHARLES RHYNE: You were asking other than police, I take it, because they said they had a 42-1/2 hour work week for police in the fourth paragraph.

MR. DODELL: Yes, Mr. Rhyne. The allegation in the complaint deals specifically with the fire protection salary budget for 1976; and so my question related to the fire protection budget for 1975 and asked whether there was any specific dollar figure that could be associated with that.

Mr. Pritchard's answer was there was not.

MR. CHARLES RHYNE: Okay.

BY MR. DODELL:

Q Now with regard to paragraph number 71 of the complaint, am I correct that Exhibit 35 is the sole basis of the allegations of paragraph 71?

A That's correct.

Q Do you know what the average work week for [174] firemen was in 1974 for Richmond?

A No, I don't.

Q And do you know how Richmond arrived at the figure of $161,000?

A I assume that they based that on the – on what the law would require and on the basis of what their situation now is. Again I see no reason that I would expect to go behind that to check their calculations.

You know, I think I should point out again that we could supply a whole stack of these. It would be ridiculous to supply 1000 or 1500 or 5000 or 15,000; and it would be even more ridiculous if you gathered the data to assume, when it was furnished, that we would go behind every one of those calculations. You don't do that in a survey.

The Department of Labor doesn't do that in surveys it does. It accepts the information that is sent in. You don't go out and verify it all.

Q Mr. Pritchard, your verification of paragraph 71 is solely due to the fact that Richmond has stated to you the conclusion that it will cost $161,000 for the period January 1, 1974, to June 30, 1975; is that correct?

A [175] That's correct.

Q Now with regard to paragraph 72 of the complaint, am I correct that Defendant's Exhibit No. 36 is what you are relying upon to support paragraph 72?

A That's correct.

Q Now do you know what the average number of hours is that policemen in Reidsville, North Carolina, worked in 1974?

A No.

Q And do you know the average number of hours that firemen worked in Reidsville, North Carolina –

A No.

Q Excuse me. May I finish the question, please, Mr. Pritchard?

A Yes.

Q Do you know the average number of hours firemen worked in Reidsville, North Carolina, in 1974?

A No.

Q And do you know how Reidsville, North Carolina, calculated the estimated increase in costs other than what is stated in this letter?

A I assume they calculated on the basis of their [176] current employment situation and the best information they had from the rules and regulations that would apply for the next year. I have no reason to doubt but what that is correct.

Q You have no other information as to how they calculated their estimates other than what is in this letter?

A I assume that they would not lie to me and that what they have given me is accurate.

MR. DODELL: Could you read back the last question, please?

(Whereupon, the Reporter read from the record, as requested.)

BY MR. DODELL:

Q Can you answer that, Mr. Pritchard?

A I thought I did.

Q I don't think you did.

A I said no, I had no other information. I had no reason to believe that what they gave me was incorrect or

that they would lie to me. I feel perfectly confident in relying on it.

Q Yes.

Now, Mr. Pritchard, in these estimates that have [177] been made of the increased – or alleged increased costs due to the Fair Labor Standards Act Amendments, do you know whether the localities took into account administrative and executive and professional employees who may be exempt under 13 (a) (1) of the Fair Labor Standards Act?

A It is my understanding that they did.

Q Do you know of your own knowledge whether they did or not?

A I think that – given the fact that that was defined in the May 1st legislation, that it applied effective May 1st, and what we have been talking about is primarily 1975 budget material, those units that have made their estimates for next year would have been expected to take that into consideration.

I would feel confident that they have.

Q Do you know that of your own knowledge, or is that an assumption that you are making?

A Well, I think they – I think it has to be – I think it has to be an acceptable assumption. On any of this data, you provide them with copies of the material. They analyze it and they make their reports based upon the information provided them; and I would see no reason [178] to assume that they would make it on any other assumption.

Q So then it is an assumption; you don't know it of your own knowledge?

A No. I think it is a reliable assumption, however.

Q But you do not know it of your own knowledge; is that correct?

A No.

Q Now with regard to the allegation of paragraph 44 – oh, excuse me, before I get to that –

MR. DODELL: Mr. Rhyne, you kindly referred to the fact – you were kind enough to refer to the fact that you had documentation for other paragraphs, or all the paragraphs, or other documentation.

If you will – want to turn that over to us, we would be happy to receive it. I won't propose to have it marked at this time; but –

MR. CHARLES RHYNE: All right. Why don't we, at the end of the deposition, give it to you then? I think we have documentation with respect to fact stuff that was included in there; like we say, the city of so-and-so estimates so-and-so. We always have that document that [179] makes that estimate.

MR. DODELL: I would prefer you could turn it over now so if anything strikes my eye so during the limitations, I could ask about it.

MR. CHARLES RHYNE: I think that actually haven't we given it all to him that relates to factual stuff?

MR. BACIGALUPO: Yes.

MR. DODELL: I have all the material that Mr. Rhyne referred to earlier; is that correct?

MR. BACIGALUPO: Yes.

MR. DODELL: Thank you very much.

BY MR. DODELL:

Q With regard to paragraph 44 of the complaint that talks about – on page 20, that talks about an ICMA study, it refers – it alleges that – and I am paraphrasing

– about 15 percent of the cities sampled an average number of hours per week greater than 60 hours presently required. That's correct, is it not?

A Right.

Q Do you know whether that – do you know what percent of the fire fighters are included in that 15 percent [180] of the cities?

A Without looking it up, I don't recall the number exactly.

All of that information is contained in Exhibit 4.

Q Do you know whether Exhibit 4 includes the number of employees that would be in those cities?

A I believe it does.

Q Well, I won't take the time now. We can check Exhibit 4 to see whether it contains the number of employees in the 15 percent of the cities.

Let me ask you this, Mr. Pritchard: Why is it that 85 percent of the cities can get by with 60 hours for fire fighters and 15 percent cannot?

A Repeat that again.

Q Why is it that 85 percent of the cities can get by with 60 hours for fire fighters and not the other 15 percent?

A That's just part of the unique character of this country. Everybody doesn't do everything the same in every community.

A city with a – some of it is a part of local custom. Some of it is a part of state mandates. Some of it [181] is the character of the community.

A –communities like Sunnyvale, and Oakwood, which are largely residential communities with practically no industry, it is not uncommon for the fire department –

the fire truck not to be out of the station once a month, even on a false alarm.

And the kind of duty that the men work is quite different than in a major city where firemen may be called out 10 or 11 times a night; and the kind of pressure and the kind of experience that the people have indicates that they need different kinds of systems to meet different kinds of conditions.

Every city isn't the same. So the conditions vary.

Q Have you made any kind of analysis to determine what kinds of cities fall within the 15 percent?

A No, I haven't.

Q You are just speculating?

A No, I am not speculating. I am basing it upon 28 years of experience in working with local governments and local fire departments and looking at and analyzing local administrative systems and working with the fire [182] insurance rating system, which influences the kind of fire insurance rates that people pay and the kind of departments that they have.

Counseling with cities, providing them information – I can say to you that the variety around the country is based upon state laws, on local customs, on the kind of communities and the kind of fire conditions and the fire hazards that exist, and the frequency of the burdens that are imposed upon them.

Q Have you ever made any study of which fire departments have – which fire departments fall within the 15 percent that –

A No –

Q May I finish the question, Mr. Pritchard?

Have you ever made any study or inquiry into the

matter of which cities or which kinds of cities fall within the 15 percent that work their employees more than 60 hours?

A I have never seen that 15 percent figure until it came out in here. That figure is changing constantly. The departments move from volunteer to paid, paid to volunteer; they change from one hour level to another hour [183] level to another hour level, based upon local negotiations; and there would be no reason to make that kind of an analysis. It would have no use. That is as far as the cities are concerned.

I might add that some cities that are down near the bottom of the scale, for example, the city of Seattle at this point is approaching a 40-hour week in negotiation with its firemen, without regard – in fact, they didn't want the Fair Labor Standards Act to pass because it destroyed their ability to negotiate a 40-hour week. They are looking at a 40-hour week; and in doing that, they are creating a situation where the firemen – and this is an example of local diversity and local experimentation, that this destroys, they are creating a situation where the firemen are being trained also as building inspectors; and instead of having fire inspectors and plumbing inspectors and building inspectors all pouncing in on people that have to have their properties inspected, the firemen in their own duty, but off call time, are going to function by their own agreement as building inspectors. And this will reduce the costs of maintaining a building department, give the public a better service, give the [184] firemen something to do instead of sit around the station all the time.

It is a much more wholesome situation, much more

economical, much more efficient for the community; but given the provisions in here, in the 20 percent requirements, they will not be able to do that now.

Q Mr. Pritchard, I am not sure I understood your answer to the question.

Why is it that 85 percent of the cities can get by with less than – 60 hours or less, and 15 percent have to work their firemen more than 60 hours?

A Because – and I assume in those 15 percent of the cities that work more than that, that the conditions in the local community and the agreements with the firemen have been such that they agree that that's the best thing for the community.

Q Have you ever made a study to see whether there are cities similarly situated, some of which are – work their employees more than 60 hours, and some of which work their employees less than 60 hours? Have you ever undertaken that kind of study?

A A survey of the cities that work more and some – [185] and the ones that work less?

Q Yes.

What I asked you is have you ever studied to determine whether there are cities that have similar characteristics, some of which work more than – work their fire fighters more than 60 hours, and some of which work their fire fighters less than 60 hours?

A I answered that once. I said no, I said I didn't think it would serve any useful purpose.

There are people that glory in uniformity. Local government doesn't fit that mold in this country. It is not uniform.

Q Is it possible, Mr. Pritchard, that cities can save

money by having more than a 60-hour work week as against other cities that have less than a 60-hour work week?

A That cannot be answered that easily because the length of the work week, a whole lot of other conditions that relate to it have an effect upon the fire insurance rating, which also has to be taken into consideration; and that is something that is very difficult to calculate and answer categorically. It is not just a question of [186] whether you work more or less hours. There is an offsetting factor in fire insurance rates that are determined under a rate system that relates to the quality of the department, including hours worked and a lot of other things. Those things all have to be put on the scale as to where those things come out.

Q How does that affect the amount of money that it costs the locality for fire protection?

A Well, there is a system known as the fire insurance rating system. Every fire department, every city is rated by the insurance underwriters – not the underwriters, it is ISO. I forget what that is. It was changed from the National – it is Insurance Service Organization, I think that's what it is. It used to be the Fire Insurance Rating Bureau.

They go in and look at every community. They are engineers. They check the equipment, the building codes, the water supply. They check the number of hours the firemen work; they check the training; they check the police support on the fire department.

All of those things are weighted; and for everything that you fall below a standard, you are given [187] deficiency points. The deficiency points determine where

you stand on the ratings scale; and if you get a rating 8 – the District of Columbia, I believe, has a rating 1, as a matter of fact. One of the few cities in the country that does.

But if you get a rating 2, you pay the insurance rates, the classification, the base upon which the rates apply is higher; and so you pay more for your insurance rates.

If you get 3, you pay more; if you get 4, you pay more. Some cities go as high as 7 or 8. The highest you can go is a 10.

When a city tries to determine how much it is going to invest in fire equipment, how many men it is going to put on a pumper, how many hours they are going to work, what kind of investment they make in training, all of those things have to be put on the scale and weighed against what kind of costs are going to be approved for the community as a whole in terms of insurance ratings.

Q Does the city pay the insurance?

A No, the private individuals pay them, but it is another kind of a tax, if the city doesn't maintain an [188] adequate fire department, then the citizens are taxed for their insurance rates.

Q [189] In terms of cost to the locality, it is possible, if a city works its firemen more than 60 hours it will cost the city less?

A Well, it might cost the city government less, but it doesn't cost the city less.

Q It might cost the city government less?

A That is right, but elected officials have to answer when the people's insurance rates go up because their fire protection is inadequate. That's not a very comfortable place to be in.

There are very few officials who are going to make a decision that results in the fire insurance rates going up and having to face that. It is as bad as having the tax rates go up.

Q If it costs the city more for – excuse me. If it costs the city less when it works the firemen more than 60 hours a week, might not the city need less tax revenue, or revenue from other sources to run its functions?

A Well, that is possible. They also might have to face the fact that the insurance rates go up, too.

Q And is it not possible also that they might then have lower taxes?

A [190] Well, it is possible.

Q So, it is possible that as a result of working firemen more than 60 hours a week, the city may have lower taxes?

A Well, I suppose that is true.

Q Now, do cities try to attract industry or residents or retirees on the basis of its – of their tax structure?

A I think that that is often talked about, but the fact of the matter is that the tax rate have very little to do with the attraction of industry. Most public officials recognize that.

Q Where is that documented?

A Oh, it is documented in hundreds of studies. Private industry will tell you that. Private industry would rather pay higher taxes and so would the general public and have good public services and good public schools and good streets and recreational facilities.

Q Could you give me one of the studies where that is documented?

A I don't have them with me, but there are many of

those where that has been done.

Q [191] Are there publications that list comparative tax structures of states, comparative tax rates so that people can make judgments, for example, about where to retire?

A There are on a state-by-state basis. I don't know of any that go into comparative studies down to the local level.

MR. CHARLES RHYNE: Did you hear that last part of the question? So people could consider that in connection with retirement?

THE WITNESS: I don't know that that is available for any purpose at that level.

BY MR. DODELL:

Q Do you know whether cities advertise as to what their tax levels might be in order to attract industry or attract people to those places?

A Oh, I think occasionally. I would hate to see that in 15,000 that somebody didn't.

Q Some may?

A Some may. I am saying it is not a critical factor in decision making as far as industrial location is concerned.

Q That is an opinion of yourself?

A [192] No. I think it is documented. You have asked if we could supply anything. We have a whole library of stuff over there. We can load the room with it if you want it.

I mean any company that does plant location, any expert that you talk to will tell you that one of the fatal mistakes that local governments have made in the past on occasion is to try to get their tax rates down to try to get industry and let the public services deteriorate to the

point people don't want to live there.

That is why poeple leave.

Q So, local governments have thought they could lure industry by keeping down their tax rates?

A They say that has been an expression in the past. That has not been a prevailing opinion for many years.

Q When did it stop?

A I think since probably World War II.

Q Is that documented any place?

A Well, I can try to find you some documentation for it if you think that is important.

Q If you can come up with that, I would be very interested in seeing documentation on those two points.

Are there any cities that might be concerned about [193] the fact that they are paying their employees more and giving them more premiums for overtime than other cities?

A I think the big effort probably with the cities is trying to keep their salaries up with the private sector and with the Federal Government.

Q What I am asking you is are there any cities that are concerned about the fact that their brother cities may be paying less to employees or giving them less in terms of fringe benefits and overtime and the like?

A Do I understand you to mean that – are they trying to get – to hold their salaries and wages down and fringe benefits down to what a lower paying jurisdiction is paying? Is that what –

Q No. My question is: Might city "X" not resent the fact that city "Y" may pay lower salaries and afford lower benefits or less benefits that it does?

A I don't think that is the primary problem that most

of them deal with.

Q Is it a concern?

A I don't think it is – I would have to say it is a very insignificant concern. I suppose they look at that, [194] but the general experience is that cities are very hard pressed to recruit top quality personnel, and that they are so constantly competing with the private sector and the Federal Government in securing quality personnel that they are constantly having to push their salaries up and the people who drag behind are always trying to catch up.

It is not a case of the low ones pulling the top ones down. It is the top ones pulling the low ones up.

Q There is not much competition with the Federal Government or with private industry if you want to work as as policeman or fireman a 60-hour work week, is there?

A Well, I can say this though, that if you go into a city – and you pick the city – I don't care which one you pick. If you go into a city where the firemen work 64 hours and the policemen work 40 hours, you will have none on the waiting list to be a policeman and you will have a couple of years supply of people waiting to get on the fire department to work 64 hours.

I don't care which city you pick. You name it.

Q But are any of these competing with – well, the 64-hour firemen list, they are not competing with the Federal Government or private industry, are they?

A [195] In some areas they are, yes. It is a very desirable position, and I can say to you that the firemen – the reason I said earlier that the firemen do not want their hours – did not want this legislation is because

when they are working a 60, 64, even a 72-hour work week, so-called, they were able to hold enough outside employment to earn double what they earned in their employment. They do not want to lose that opportunity, and when you reduce their hours, what they are being forced down to is a straight shift basis, gradually, which is going to eliminate their potential for outside employment, and they don't like it.

Q What is that information?

A Oh, that is so – that is such a prevailing common view that it is just generally known.

You can get on the phone and almost any painter that you call in the phone book, in the yellow pages, will end up being an off-duty fireman.

Q Can you document that in any way?

A Yes. It is such common knowledge. Firemen – this is historical. Firemen have worked on off-duty time. They work their shifts so that they work three days in a row, even though they should have 24 on and 48 off. They [196] bunch their shifts so they work 72 hours in a row and take the rest of the week off and run a private business and collect Social Security.

That is why they never wanted in under the Social Security system. Firemen are still, except in a very few states, not under the Federal Social Security program, because they want to be under their own pension programs and then they run a private business on the side and come under Social Security.

And they are under two systems, earning twice the pay.

Q And that is common knowledge?

A Oh, that is common knowledge. Everybody knows

that.

Q And the International Association of Fire Fighters or whatever the national union is called, – is that the correct title?

A International Association of Fire Fighters; they know that. Certainly they do.

Q They supported this legislation?

A Certainly. That is why they lobby the legislation at the state level to insist that the hours – that [197] shifts for firemen have to be on 24-hour duty shifts, because they don't want this legislation. They have this at the federal level. They don't want the legislation to be – the hours to be pushed back in such a way that they have to work eight-hour shifts.

Q Mr. Pritchard, the International Association of Fire Fighters – is that the name of it?

A Right.

Q They lobbied for this legislation, is that correct?

A The national union did. Many of the local councils did not.

Q You don't know how many, though?

A Well, there was – there was testimony submitted to the Congressional committees. I suppose that could be looked up. I don't know how many filed statements. There were a number of –

Q So, it is your view, based on common knowledge, that the firemen don't want the statute, and then it follows it seems to me, does it not, that the International Association of Fire Fighters then doesn't know what its membership wants? That is your position, I take it?

A [198] I don't know that – what the purpose of that statement is in this record. I have some opinions as to

why this was done, but I think they are unrelated to this case.

Q Well, Mr. Pritchard, you volunteered not in response to any question that I asked that you know what the firemen want as a result of common knowledge.

I didn't ask you any question to induce that. You simply – excuse me, may I finish – you simply decided to say that.

And so, what I am saying, asking you is, is it your opinion that you know better what the firemen want than the International Association of Fire Fighters.

A You asked me why – what the national union was doing and why they represented that opinion. I have some opinions as to why they did it, but that is speculative. I don't see that assigning that to this record would contribute to this discussion.

Q Well, let me ask the question again. I think it can be answered. Is it your view that what you represent to be common knowledge about what firemen want is a more accurate reflection of what they want than what the International Association of Fire Fighters –

[199] MR. CHARLES RHYNE: You are arguing with the witness. I think you are way off any possible issue here.

MR. DODELL: I asked the same question three times.

MR. CHARLES RHYNE: And you argued three times.

MR. DODELL: Excuse me. Mr. Pritchard has been unwilling to answer it. Excuse me. The question that I am asking is asked because Mr. Pritchard volunteered some comments that have nothing to do with any question I asked.

MR. CHARLES RHYNE: He answered your question.

MR. DODELL: Excuse me. I followed it up with a question. If Mr. Pritchard doesn't want to answer the question, let the record stand if he answers it, it would save a lot of time.

MR. CHARLES RHYNE: You have been arguing all day with the witness. When you get – rather than asking questions.

When you get a response, you don't like, you keep on arguing. I think we ought to move on to something else.

MR. DODELL: Your view then, is that Mr. Pritchard has answered the question?

[200] MR. CHARLES RHYNE: Yes.

MR. DODELL: The record will reflect, my view is that he has not answered the question.

MR. CHARLES RHYNE: Well.

BY MR. DODELL:

Q Do cities view themselves in competition in seeking to attract industry or seeking to attract residents or seeking to attract retirees?

A I can't answer that categorically, because if you are aware, if you have been reading the newspapers, you know in this area, for example, a number of communities that are trying to adopt no-growth policies where they don't want more population and they don't want more growth.

The situation varies all around the country from city to city, and unit to unit. It makes the conditions different every place.

Q Do some cities deem themselves in competition with other cities in seeking to attract industry or residents or retirees?

A I assume they do in some cases. It is not something you can answer categorically, though.

Q Well, I don't understand what you mean when you [201] say you can't answer it "categorically," Mr. Pritchard.

MR. CHARLES RHYNE: Quit arguing with him now. Tell him – you keep arguing with him. All day long you have been arguing. Why don't you tell him what you mean by "competition"?

He answered your question. Then you go on and on asking the same question.

MR. DODELL: Mr. Rhyne, you can make objections; I will conduct my questioning. I will do it best I can.

MR. CHARLES RHYNE: Yes, but just stop arguing with him all the time.

MR. DODELL: I assume you will do the best you can. I think the record will show in many instances Mr. Pritchard has volunteered gratuitious remarks, that have not been responsive to the questions.

MR. CHARLES RHYNE: I don't agree with that at all.

MR. DODELL: I know that.

In this instance, I simply don't understand what Mr. Pritchard means.

MR. CHARLES RHYNE: You are way off in the wild blue yonder on something that has nothing to do with this [202] case anyway.

MR. DODELL: I wish you would let me finish. I am a very impatient person generally, and I tried to restrain myself from interrupting Mr. Pritchard when he is going on being unresponsive. I wish you could extend the same courtesy.

MR. CHARLES RHYNE: I think you are arguing with him. Why don't you ask questions?

[203] BY MR. DODELL:

Q Mr. Pritchard, I don't understand what you mean when you say that the question, do some cities deem themselves in competition with other cities in seeking to attract industries or residents or retirees, cannot be answered categorically.

What do you mean it can't be answered categorically?

A I just cited the fact that there are a number of cities around the country – Boulder, Colorado; Petaluma, California; Fairfax County out here – there are many of them around the country, a number of them in Florida, that are – that have been acting to initiate no-growth policies because their environmental conditions have reached the point where they can't and don't want to absorb more population or more industry or more business.

Now, I can't categorically say that cities are across the board in competition with each other. There are some cities that are growing; there are some cities that are stable; and there are some cities that are aging and declining.

Cities have a life cycle just like people do. When they are young and growing, they are expanding, they are trying to attract industry and residents and so forth.

[204] There is a growth cycle that they go through. There is a point at which they stabilize, they become surrounded; they can't grow any more. And then there is a point at which they start to decline and start to renew themselves. They are all in a different stage of development.

Some are trying to get new residents, some are trying to attract businesses; some are trying to hold businesses. They are in different stages of development, growth and

change all the time.

You can't categorically say that they are all trying to attract residents or business or industry.

MR. DODELL: For the record, and in light of Mr. Rhyne's prior observation, the record will reflect that the question was: do some cities deem themselves in competition with others in attracting industry, residents, and retirees.

The question was not: do all residents – do all cities deem themselves in competition.

Excuse me, Mr. Rhyne. I again think lawyers should maintain a degree of courtesy to each other.

MR. CHARLES RHYNE: I wish you had a little of it.

MR. DODELL: You interrupted me several times in a row. I would like to start my observation again because [205] I lost my train of thought, due to your interruption, Mr. Rhyne.

The question was: do some cities deem themselves in competition with others in attracting industry, and residents and retirees.

Mr. Pritchard gave a lengthy dissertation on whether you can say that all cities deem themselves in competition. That was not the question. That was typical of the nonresponsive answers we have been getting today.

MR. CHARLES RHYNE: And it's typical of the kind of questions you have been asking. You say some cities. You are talking about 15,000 cities. You might mean 2, 3, 4, 5, 10. That's the kind of questions you have been asking.

So how in the world can you expect a man who knows more about city government than anybody else to answer questions such as that? You have to be – if you ask a

general question, he says it can't be answered that way.

MR. DODELL: Mr. Rhyne, I think you are testifying if you are saying that Mr. Pritchard knows more about city government than anybody else. You are not a witness here. You are not sworn. That's just your observation.

MR. CHARLES RHYNE: Well, he knows more than you do.

[206] MR. DODELL: Well, that's why he's the witness and I am a counsel.

BY MR. DODELL:

Q Mr. Pritchard, I will take up Mr. Rhyne's suggestion.

What percentage of these 15,000 cities are in what you call the growth stage, and are seeking to attract industry and residents –

A That's an impossible question to answer.

Q Excuse me. For the record, that's the question Mr. Rhyne said I should be asking.

MR. CHARLES RHYNE: No. You are asking questions that really don't have anything to do with any issue here, of such a general character that they are impossible to answer.

When you look at 15,000 cities, I mean, you ask a broad question and don't like a broad answer.

BY MR. DODELL:

Q Mr. Pritchard, is there a substantial number of cities that are seeking to attract industry and residents and retirees?

A Again, when I look at 15,000, what is substantial? 10, 20, 50, 100, 1000, 50 percent? I am saying that, you know, you are asking a question that is a typical layman's [207] question of how cities function and how they develop and how they grow.

Cities do not sit in a situation where they are and set up a policy that we are going to attract old people, retirees, we are going to attract industry, this; and launch on a campaign and go out and look at what everybody else is doing and manipulate their tax rates and all their policies to deal with that.

That isn't the way cities function. That isn't the way they work.

It's just an unanswerable question; that isn't the way cities function. Cities are responsible to do – to provide a set of services and create an environment for people who live in them and to make an attractive place for people to work and live and recreate, and for where industry is looking for a place to go, to provide facilities and so forth for those industries; or people to build homes, whatever it happens to be.

Now, it does happen that a city – that an industry will begin looking around for a location, and they will look at a city, and a city will try to sell them on a particular location; and in some cases by state law, cities are permitted [208] to give certain kinds of taxes – certain kinds of incentives or write-offs or extended assessments, low assessment, or something for an industry, as in the case of Kansas City, for example, under Missouri law to build something like the Crown Center or the Quality Hill development projects.

But they don't set an across-the-board, low tax rate for the purpose of holding out a butterfly net to catch any industry that happens to be floating around.

It just doesn't work that way.

Q Mr. Pritchard, that was not even the question. The question was – there was no reference to tax rate in the

question.

The question was: is there a substantial number of cities that tries to lure new industry, new residents and retirees?

A You started your question, though – the series of questions by talking about keeping their tax rates down for the purpose of attracting industry. That's where the series started.

I'm trying to point out to you that, sure, there are cities that are growing, that need new industry. They want increased population. They have facilities to [209] accommodate them.

The city of Cleveland has a sewage treatment facility that is only operating at 70 percent of capacity. Obviously it would like to attract population and industry that would meet – would fill that capacity. That's true.

But the city of Cleveland doesn't sit there, on the other hand, shaving its tax rate, cutting it down to a bare minimum, underpaying people, all of this stuff to try to get an industry. It doesn't work that way. The system doesn't work that way.

Q Let me ask you this, Mr. Pritchard: let's say there is a city that is in the stage that you spoke about that wants to attract industry; and let's say that it has a work week for firemen of less than 60, and a work week for policemen of less than 60.

And let's say that it has a tax structure that goes along with that work week, those work weeks.

Suppose that another city has a work week for firemen of more than 60, and a work week for policemen of more than 60, and is also trying to attract industry.

Of what interest would it be to the first city to try to see to it that the second city could continue to employ [210] firemen and policemen more than 60 hours a week?

A That's too hypothetical a question, unless you could – I would – it's just too hypothetical a question to answer, because there is no way of knowing how that would relate to anything else in the community, the quality of fire service, the costs, the insurance rates.

There's no way you can answer that question on that kind of a set of facts.

I know what you are trying to get at. I appreciate what you are trying to get at. If I could answer the question so you could have a yes or no answer based upon what you are trying to do, I would be glad to do it.

But you are coming at it in a very naive way which just doesn't fit the real world. You are trying – what you are trying to do is get me to say that if cities worked their firemen 64 hours instead of 56 hours, they will be in a better position to compete for industry because it keeps their taxes low.

And I say to you, you cannot create that kind of a condition because that isn't the way a city functions, because there are too many other political ramifications; there are too many other costs that are related to it that [211] offset it on the other side. And decisions are not made that way.

Q But I am asking you this question, Mr. Pritchard: if there is another city that has a 56 week – let's assume you are right for the moment. Let's assume that the city won't maintain a 64 hour week for that purpose. Let's assume for the sake of argument that's correct.

If another city thinks it should only have a 56-hour work week, and if that – both cities are interested in attracting industry, why would the 56-hour city have an interest in defending the right of the 64-hour city to continue a 64-hour work week?

A I wouldn't –

Q What interest would it have –

A Probably the only thing I could – the only answer I can give you is that elected leadership of cities have consistently argued for the right of home rule. They have also argued that the conditions of – the conditions of work, the ways things are financed, the way programs are worked out is a matter which they, as locally elected officials responsible to the community as a whole, have to work them out.

[212] And they very much resent – and this has been historical – they very much resent the state legislature and the federal government coming in and telling them that they have to handle their business in a certain way.

They would generally say that if that city wants to operate its fire department in a certain way, if it wants to use 1956 fire trucks, and have its people work 60 hours a week, and wants to pay them twice as much for it, or whatever it happens to be, that's their business. That's their community. That fits the needs of that particular community and that's what the community wants; and they have to stand for election and defend it.

The Wage and Hour Division doesn't stand for election; I don't stand for election; you don't stand for election; but those local officials do. They are answerable to that community for the tax rate, for the quality of service, for the way they treat their personnel.

When we come in from here and try to put somebody in a regional office of the Wage and Hour Office out there, and tell them how to structure their fire department and not be responsible for the taxes, for the quality of service, or the insurance rates, that isn't what they understand and what [213] this country has understood to be the home rule concept, of a decentralized concept of federalism.

That's what the issue is. What we are talking about is power.

You are trying to talk about dollars. We are talking about power.

Q How have you ascertained that the cities that have lower than 60-hour work weeks and that would not have additional overtime obligations as a result of the Act agree with your view that the autonomy of other cities should be preserved?

How have you ascertained that?

A I have never, in 28 years, seen a city official whose employees work less and get paid more than an adjoining city or any other city in a jurisdiction. Go into a state legislature, for example, and try to support legislation, even though it was introduced by somebody else, to impose the same conditions on another municipality to make them even.

That is not the concept under which our system works.

Q [214] Mr. Pritchard, let me ask you again how do you know that – let me ask it more directly: How do you know that your membership supports the position you are taking in this litigation?

A Well, in the first place when this issue came up the – I took the matter and we gathered some of the facts on

it. I took the matter to our board of directors which is elected by our membership. The board of directors unanimously instructed us to proceed for the development of this case.

Secondly, we had a meeting here in Washington last March after this legislation was reported by the House committee. At that point we had done everything we could to represent a policy position adopted by our membership a year earlier to defeat the legislation in the Congress. We were arguing among other things on its unconstitutionality.

We assumed at that point that it was so far along that it could not be passed, and with some 1,500 local government officials here in town, we proceeded with a meeting on several other subjects, and the delegates were so upset they took the agenda away from the program that had been developed and made this issue the No. 1 issue. They spent all their time on the Hill trying to influence this [215] particular issue, because they were so opposed to it.

We just finished a meeting with some 4,000 local government officials, elected officials, mayors and councilmen in Houston, our annual Congress of Cities. These are people who come with credentials from their local mayor and council. He comes as a credential delegate from his elected governing body to that meeting, and they – we felt the legislation was passed, and we were in the courts, and we ought not to say anything more about it. Those delegates took it out of the hands again and passed a policy position – not a resolution, but a stated policy position – calling for repeal of the legislation because they said it is not necessary and it is

none of the Federal Government's business.

Q When was this?

A This was just the first to the 5th of December.

Q Of this year?

A This year.

Q There were 4,000 delegates?

A That is right.

Q Representing how many municipalities?

A [216] I don't have the whole tally yet.

Q Was there a vote?

A Oh, yes.

Q What was the vote?

A It was unanimous.

Q Unanimous vote of the 4,000?

A Unanimous.

Q Were your proceedings recorded?

A That is right.

Q And the 11,000 municipalities were not represented?

A Well, all of those municipalities are represented through a voting system. Some of the voting delegates are elected from all of the municipalities in the state, and they are representatives of all those municipalities, coming from the state. So every municipality doesn't have to be there. The municipalities collectively select a group of delegates just like the states select – people in the states select a group of delegates to go to a party convention. Everybody in a party doesn't go to the national party convention. They go as delegates representing the people in the state.

So they are all credentialed delegates representing the local governments in that state.

Q [217] Is it your view that the position taken in this litigation represents the view of every one of the 15,000 municipalities that are your members?

A I wouldn't want to say there is somebody that takes exception to it. As a matter of fact, I am sure there is. I am sure I could go out and find half a dozen people that would take a different view, for one reason or another. We have some members of city councils and some mayors who may very well be presidents or organizers of the local labor union who very much believe in this. I am saying out of the delegates that have come to these meetings over the years and have considered this legislation, the vast majority of them – and in any other system all you need is a majority. We can't even adopt a policy except by a two-thirds vote. We don't adopt things by a majority. Unless we have a two-thirds vote they aren't adopted. When you get something like that with two thirds, or unanimous in a group of that kind, I think that is a pretty representative opinion. You can't destroy that credibility with finding a half a dozen people around the country to disagree with it.

Q Your complaint refers to the fact that a number of the states have regulations of various kinds with regard to [218] the municipal governments.

By the same reasoning under which –

A My complaint?

Q The complaint in the case, this document that was filed.

A Oh, I see. All right. Okay.

Q The complaint –

A I thought you meant I was personally complaining.

Q No. I mean the complaint filed by the National

League of Cities.

A Yes.

Q That complaint refers to the fact that some of the states have regulation of municipalities, hours and working conditions.

Does the same reasoning indicate that the cities believe that the states should not be regulating their hours and working conditions as well?

A That is true. The city viewpoint is that the people that have the responsibility to administer the programs that are elected have the responsibility to administer the programs to raise the taxes, to allocate the resources, should not be imposed upon by the states enacting legislation [219] without providing the financial support to go with it.

Now where the states have come in and mandated hours of work, without providing resources, that is a position that the cities have traditionally opposed in the state legislatures.

Q So as a policy matter cities make similar argument against state regulation as they make against federal regulation here.

A That is correct, but there is a different basis for it. You have to understand there is a different basis for it, a much different basis.

Q Well, what do you mean there is a different basis for it?

A Well, the states have the right to do it, if they want to do it because the cities are instrumentalities of the states, but the states and their instrumentalities are in a different relationship with the Federal Government than are the cities in relationship to their states.

Q But with regard to the policy considerations that you referred to, the same policy considerations are applicable?

A That is right.

Q To state regulation?

A [220] That is right.

Q Do you think that the state regulations, hours, and working conditions of municipal employees were unnecessary?

A I don't know exactly how to answer that. I think that they were undesirable. I think that in most jurisdictions you will find that even the most – even the jurisdictions that generally have the most advanced working conditions are ones that are way ahead of the state legislation, and the state legislation tends to only deal with a small number of stragglers and it doesn't really involve an awful lot – the majority of either the units or the majority of the people that are affected.

Q So the states have felt it necessary to deal with stragglers?

A It has come largely as a political matter, not as a – it is seldom ever dealt with, and I have been through many of these struggles in the state legislatures. It is very seldom if ever dealt with from the standpoint of social concern; that is, are people working too many hours? It is simply a matter of political pressure that is put on the legislatures and they act because they feel they must.

Q [221] So your testimony is that the states are adopting these regulations with regard to the municipalities because of political considerations rather than because of need?

A I think that is generally the case at the state level.

Q I would like to come back to the complaint and I would like to ask you with regard to paragraph 44, page 20.

It says "Allowing for overlap between these groups and calculating the average increase from the data gathered, the minimum impact for the first year on fire personnel budget nationwide is estimated at a minimum of $200 million."

Do you know how that figure was arrived at?

A It was arrived at based upon the data compiled in here –

(Indicating.)

– from the reports that were put together in this report.

Q The report doesn't contain the figure; is that correct?

A No.

As I indicated, the data – we helped with the survey instrument. ICMA collected – used the instrument [222] to produce this report.

We then sat down with Bill Danielson and with Mike Mitchell, Battalion Chief from Los Angeles, and Bill Danielson from Sacramento and a special task force composed of some representatives of local government and some other experts in this field and – which worked with us all the way through the public hearings on the regulations, and looked at all of this data and made the projections that are contained in here.

And they are, I think as reliable an estimate as anybody is able to make because they are based on a much broader array of data than anybody else in the country has available.

Q Is it possible for you to go through those calculations and the projections?

A Here?

Q Well, here, if you can.

A I didn't go through the calculations myself.

Q Did you check them over?

A My staff went through the calculations.

Q Did you check them over?

A Well, within reason, yes. I know basically they [223] explained to me what they did.

Q Is there a document that exists that contains those calculations?

A I would have to look and see.

Q I will ask Mr. Rhyne –

MR. DODELL: Could you provide us with this?

MR. CHARLES RHYNE: If there is one, I will give it to you, yes.

MR. DODELL: You don't have anything here?

MR. CHARLES RHYNE: No, I don't. If I did, I would give it to you.

I think, as a matter of fact, since you mentioned it, I checked myself through here, and I find that our Exhibit 4-A which you already have – I want to be sure the things referred to in the complaint – and Exhibit 4-C, 6-A, 6-B, and 6-C are probably things we did not give to you but that were marked.

I am not sure.

MR. DODELL: The regulations, of course –

MR. CHARLES RHYNE: Those are the regulations themselves.

(Indicating.)

[224] These are these Commerce Department studies, you see.

This one is '73, see. They are more data on employment of public employees. That is about the size of it, and the regulations.

MR. DODELL: The regulations we obviously would be familiar with. This other data I am not familiar with at this time.

Are these spares?

MR. CHARLES RHYNE: Yes. You may have them.

MR. DODELL: Thank you very much.

MR. CHARLES RHYNE: They are data that was used in working on the complaint. I think the paragraphs are marked as in the other instances where they are referred to, you see.

MR. DODELL: I don't think we should mark them as exhibits here at this point. I haven't referred to them yet, and I don't know that I will.

I do appreciate your saying that you will undertake if there is some –

MR. CHARLES RHYNE: I will. We will ask the staff.

MR. DODELL: If there isn't a writing, then I [225] wonder if you would undertake to explain how this was arrived at?

MR. CHARLES RHYNE: We can ask the staff how they arrived at it, sure. I understood he was not to bring with him his experts, just bring himself. I so instructed him.

MR. DODELL: We did not ask for the experts.

MR. CHARLES RHYNE: I know you didn't. That is why they are not here.

BY MR. DODELL:

Q This goes back to Defendant's Deposition Exhibit

37. I would like to call your attention to the summary of findings that is on page 1.

MR. CHARLES RHYNE: You say Exhibit 37?

MR. DODELL: This is our Exhibit 37. We will have to get you a copy of this.

MR. CHARLES RHYNE: All right.

BY MR. DODELL:

Q I would like to call your attention to the passage – Why don't I read it into the record?

"The nationwide survey of state and local governments excluding education and hospital institutions indicates that wage levels for state and local government employees not [226] covered by the FLSA are on the average substantially higher than those of workers already covered. Hence, if coverage under the FLSA is extended to these workers, comparable minimum wage and overtime standards would not have as great an impact as did the earlier extension of FLSA coverage to employees of state and local governments, schools, hospitals, and residential care establishments."

You can look at that, Mr. Pritchard. I wonder if you agree with that or disagree with that.

A I think I would agree in part. I think I would agree in the first part of it, in the sense that this is what the *Congressional Record* said and it is what we said, that there was no need for the legislation in terms of the minimum wage; that the wages at the local level generally are in line with community wage levels, and there are very few instances where there is any situation where public agencies fall below the minimum wage.

Now the part I would question – and I again can't document here, but I think this is a matter of just

sensible interpretation – one would have to question what this means when it says that it would not have as great an impact as did earlier extension of FLSA – FLSA wage covered [227] employees at state and government schools.

If it means in total – if it means they were underpaid and were brought up, I would suppose that that is true. If it means in terms of total fiscal impact and other related impacts, then I doubt that that is true.

You see, I would point out, for example, that one of the things that is not recognized is that in local government service the majority – well, I won't say the majority – the biggest block of employees in city government are in the police and fire service. There is historically a parity situation between police and fire.

Now if you have a situation in a city and this is – this is by far the general case, where the firemen – let's say – let's say they are working 60 hours, and the policemen are working 44 hours. Therefore, the policemen comply – let's say the firemen are working 64 hours. They are not complying with the law now. The policemen are working 44, so they are in compliance.

You, by law, reduce the hours of the firemen. You immediately destroy the parities that existed between the uniform services. You immediately then have to do something for the policemen. When you have then done something for the [228] policemen and the firemen, you have destroyed the ratio between the biggest single block of employees and all the rest of the employees in city government and you immediately have to restructure the whole wage system.

That is the way local salaries and wages are keyed.

They tend to be keyed to the police and fire services; so that when you are talking about this, the fact that the policeman and fireman may not be affected by the minimum wage, the fact that you affect the firemen's overtime or the hours that they work – that is what I mean, not the overtime, but the hours they work – and you end up having to reduce the hours, you have a significant ripple effect that changes the salary relationships and salary structure for all of the municipal employment. It just sets off a chain effect. It happens every time.

In the State of Ohio, for example, the firemen in the City of Cleveland, by a referendum initiated in Cleveland, and adopted by a public vote, says that the salaries for the firemen in the City of Cleveland have to exceed by a given percentage the salaries paid to the highest paid firemen in any other jurisdiction in the state; no discretion by the city at all – by the city governing body. Whenever [229] any community, whether it is Worthington, Oakwood, Cherry Hills, or some little community, or Cincinnati, raises their firemen's salaries, the City of Cleveland has to raise their salaries so it exceeds that limit by a certain percent. As soon as that happens, all the rest of the salaries in the city have to be adjusted.

So by that particular act, they not only fixed the firemen's salaries, but the salaries of everybody in the city.

So when you say it will not have a significant effect as it did in this other, I would challenge that as a statement depending upon what interpretation is put on that.

Q Do you have any documentation on that other than

the observations you just made?

A I would point out my basis for that observation, and that was if you look at my résumé you find from 1961 to 1962 I was staff director for the municipal commission which was a half million dollars Ford Foundation study of the staffing of city governments and municipal power. It is the most comprehensive study that has ever been made of how cities run their personnel systems in this country. It is based upon a very extensive analysis of some 600 field [230] interviews of that situation, and I think I speak with some knowledge of how the system works.

Q How does that bear on the question of whether the 1966 amendments or the 1974 amendments had a greater impact on –

A I –

Q Excuse me. May I finish?

– on state and local governments?

A I am saying this phrase can be interpreted two different ways. If it is saying that the impact of the '66 amendments was great because it raised low-paid school and hospital employees up to the minimum wage, I think it is probably correct. If it is saying that the total dollar impact of the new legislation will not be as great as that, I doubt that that is true. I am saying that this is not a case of just bringing people up to the minimum wage, which did not have the impact of setting off a whole set of chain reactions.

The new legislation will set off a whole set of chain reactions because that is the way the system works.

Q It is correct, is it not, that in terms of changing the number of hours worked, 15 percent of the cities have

[231] firemen working more than 60 hours and the other 85 percent do not have firemen working more than 60 hours?

A We are on the first stage; we are in the first stage. We are on our way, under this legislation, to go down to 42 or 40 hours, not 56 or 50.

Q [232] Then would you say it is true as to the first stage, that the statement that I have shown you is true as to the first stage?

A I don't know what the magnitude of the impact of the '66 amendment was. I haven't see the dollar numbers. I suppose it is in here. If I examined this, I suppose I could determine it. I don't know that we felt in looking at this and looking at the principle of it that comparing it to what happened in '66 was a significant concern.

Q So then, you are really not equipped to comment, if you don't know the –

A You asked me if this statement was correct. I said part of it I would agree with, the other part I think is questionable.

Q What I am asking you is if you don't have the figures as to the '66 amendment, then it is really difficult to make the comparison, is it not?

A That is why I raised – I said I raised the question. I have a question on the basis of my general knowledge as to whether that last part was accurate. I don't have the figures to prove it, one way or the other.

Q Now, I see in my notes, coming back to paragraph [233] 44, the last sentence, I have the same question that I had as to the 200 million figure. This sentence reads, "Increased costs for other essential state and city governmental functions are reasonably certain to amount to billions of dollars per year, due to the impact of these 1974 amendments to the Act."

I take it you are not prepared at this time to go through the calculations to indicate where that billions of dollars per year comes from?

A No.

Q Again, I would ask if there is any documentation that shows that calculation, I would ask that it be provided to me.

If there is no such documentation, whether a letter could be written or some kind of written explanation as to how that figure was arrived at.

(Discussion off the record.)

MR. DODELL: If you will indulge me a moment, I would like to consult with my co-counsel.

(Recess.)

MR. DODELL: I am delighted to say that we are going to give you back an hour and three-quarters. I think [234] we have asked everything that we had in mind.

MR. CHARLES RHYNE: The only thing I am going to do is have his biographical data marked.

CROSS-EXAMINATION

BY MR. CHARLES RHYNE:

Q Is that what you furnished as your background data?

A That is right. Yes.

MR. CHARLES RHYNE: I will have that marked as Plaintiff's Exhibit 1.

(The document referred to was marked Plaintiff's Exhibit No. 1 for identification.)

MR. DODELL: I think that is fine. Could we go off the record for a moment?

(Discussion off the record.)

(Whereupon, at 5:15 p.m., the taking of the deposition of Allen Pritchard was adjourned.)

[Certificate omitted in printing]

Transcript of Deposition of Charles A. Byrley, December 24, 1974

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NATIONAL LEAGUE OF CITIES, et al.,	)	
Plaintiffs,	)	Civil Action
vs.	)	No. 74-1812
HONORABLE PETER J. BRENNAN, Secretary of Labor,	)	
Defendant.	)	

DEPOSITION OF CHARLES A. BYRLEY

Washington, D. C.
Tuesday, 24 December 1974

Deposition of CHARLES A. BYRLEY, called for examination by agreement of counsel, at Room 4121, Labor Department, 14th and Constitution Avenue, N. W., Washington, D. C.; at 9:55 a.m. before Dennis A. Dinkel, a notary public in and for the District of Columbia, when were present on behalf of the respective parties:

CHARLES S. RHYNE, WILLIAM RHYNE, and RICHARD BACIGALUPO, Esqs.; on behalf of Plaintiffs.

NATHAN DODELL, Esq.; Assistant United States Attorney; on behalf of Defendant.

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PROCEEDINGS

[3] MR. CHARLES RHYNE: With respect to the part of the court order allowing the Plaintiff to take depositions of Defendant's witnesses, we have decided that if defendant will give us a statement of the basis of the $27 million estimated increase in cost set forth in the preamble to the regulations as published on December 20, 1974, for police and fire, and will state in there the facts on which that $27 million estimate or whatever it is based, and whether it is applicable to both states and cities or just cities, we will not take the deposition of Defendant's witness on that subject on the 26th.

By on that subject, I mean on the basis of cost.

Secondly, if Defendant will give us a letter stating why we cannot see the thousands of letters of protests that were described at a recent White House meeting and why we cannot take Mr. Faulk's deposition – Mr. Faulk being the one who presided at that meeting, with respect to these letters – and we understand that the basis is confidentiality or executive privilege – we will not take Mr. Faulk's deposition on the 27th.

That completes my statement about those [4] depositions, and I would like to have those letters served on us at the same time as your brief.

MR. DODELL: Mr. Rhyne, these are matters that we will obviously have to consider and I will have to discuss it with my clients as well as with my office. We will give you an answer as promptly as we can.

I would just say for the record that we have been trying to work out the question of what depositions you wanted to take, and we have been discussing these

matters since Thursday, and I appreciate your reducing what you need to these two items.

I think you will concede it is true that this is the first time you have made this proposal in these terms, and I can't give you an instantaneous reaction.

What I will endeavor to do is let you know as early in the day on Thursday what our reaction will be to these two questions. I would say today – but it is Christmas Eve and I don't know who we will be able to reach today.

I think you indicated yesterday that you were having trouble reaching people at your own office yesterday afternoon.

[5] If that is agreeable, then that would be fine.

I would like to say just for the record that I wasn't present at the White House meeting that you were fortunate enough to be present at. I wasn't in the case yet at that time.

I understand that your recollection is that there was a reference to thousands of letters. I spoke to somebody who was at the meeting who doesn't recall that there was a reference to thousands. I don't think we have to really get into a dispute about that. That is just for the record.

I thought I should make that point.

I very much appreciate the effort and accommodation that you have made and your courtesy in that regard.

Is it agreeable to you that we get an answer to you as early as possible on Thursday?

MR. CHARLES RHYNE: Yes.

MR. DODELL: The answer would be sure, we will supply this at the same time we file our brief, or if we can't, we will work out some other arrangement.

MR. CHARLES RHYNE: Fine.

With respect to this morning while Mr. Byrley [6] is out of the room, I should tell you – and I think it will expedite his examination, we would like to give to you now the letters that he has from governors, that relate to the impact of this Fair Labor Standards Amendments on states.

I believe he has nine – a set of nine letters, one from the Governor of Wyoming, one from the Governor of Maryland, one from the Executive Assistant to the Governor of Missouri, one from the Governor of Arkansas, one from the Governor of Florida, one from the Governor of Iowa, and one from the Governor of Vermont; one from the Governor of the State of Washington, and one from the Governor of the State of Utah.

These are letters, as I have said, that Mr. Byrley has with him with respect to impact of the Fair Labor Standards Act Amendments of 1974 on states.

In addition to that, we have already given you – you have marked as Exhibit 12, the letter that has reference to paragraph 50 of the complaint from the Assistant Attorney General of Arizona, that reporting the facts with respect to Arizona.

MR. DODELL: I want to thank you for these [7] letters, Mr. Rhyne, but merely for the record, these are matters that are not specifically referred to in the complaint. Is that correct?

MR. CHARLES RHYNE: That is true. I say we give them to you because – well, I will just have to let Mr. Byrley explain them. I will tell you, he gave them to me as representative of the states and the effect of the Act on them.

You can see they are all rather late dated, in the last few days, and we are just trying to give you all the information that we have with respect to impact.

MR. DODELL: Thank you. As I said I merely wanted to refer to the fact that these are not referred to in the complaint.

MR. CHARLES RHYNE: That is true.

MR. DODELL: Off the record.

(Discussion off the record.)

MR. DODELL: Can we go on the record for a moment?

Mr. Rhyne, yesterday at the deposition I think that your associate, Mr. Bill Rhyne, indicated you had all the exhibits except 37, nonsupervisory employees in state [8] and local governments submitted to the Congress in 1971. We have a copy. I am pleased to be able to give it to you.

MR. CHARLES RHYNE: Thank you very much.

(Discussion off the record.)

Whereupon,

CHARLES A. BYRLEY

was called as a witness, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DODELL:

Q Mr. Byrley, for the record, could you state your full name and address?

A Charles A. Byrley. My home address is 9205 Christopher Street in Fairfax. My office address is 1150 17th Street, N. W., Washington, D. C.

Q Mr. Byrley. Mr. Rhyne was kind enough to give us a biographical sketch. Why don't we have this marked

Defendant's Exhibit 38 for identification.

(The document referred to was marked Defendant's Exhibit No. 38 for identification.)

[9] MR. DODELL: Off the record for one moment.

(Discussion off the record.)

BY MR. DODELL:

Q Mr. Byrley, I take it that Defendant's Exhibit 38, your biographical sketch, reflects your professional experience and your education; is that correct?

A That is correct. It is done quite briefly, as I am sure you have observed. I assume that is adequate. Any questions you may have, I would be happy to respond to them.

Q I would ask you, Mr. Byrley, to refer to paragraph 50 of the complaint.

A Yes.

Q I would ask you also to refer to Defendant's Exhibit 12.

A All right.

Q Now, is the entire basis for paragraph 50 of the complaint found in Defendant's Exhibit 12?

A Yes.

Q Now, reading paragraph 50, the estimate of cost is for fiscal year 1975 to 1976?

A Yes, sir.

Q [10] Do you know whether that is a fiscal year that begins July 1, 1975?

A Yes, sir because Arizona is on a July to June fiscal year. Yes, sir.

Q That being the case, am I correct in saying that there is no specific dollar figure for the alleged cost that the Fair Labor Standards Act Amendments will have for

Arizona in the fiscal year ending June 30, 1975?

A No. As stated by the Plaintiff, I think they are speaking of the $2.5 million, actually for the one year. The projection actually is not made, as I read this.

Q The projection is not made for the year ending June 30, 1974; is that correct?

A That is my understanding of the statement, yes.

Q Now, looking at paragraph 50, there is a reference to a $1.5 million increase in the cost of providing state police services. When you examine Exhibit 12, do you find a reference to increase in the cost of providing state police services in Exhibit 12?

A Not on my cursory reading, no, sir.

Q Mr. Byrley, do you recall what the source is of the information regarding state police services?

A [11] I would assume that – first of all, if I am not mistaken – and I think I am correct in this, there perhaps have been more than one conversation. I know of at least one conversation I guess from the Assistant Attorney General or the Attorney General himself, in Arizona, to counsel.

I know there has been a call to my own office. I therefore make the assumption that the statement is made in the complaint itself. That it is taken from a prior conversation, perhaps with Mr. Rhyne himself.

Q Do you recall any conversation in which that –

A I have not personally talked with the Attorney General or the Assistant.

MR. CHARLES RHYNE: I don't want to interfere with your examination, but I think I should state again on the record that copies of this complaint were sent to every city or state named here, and they confirmed the

accuracy of the facts.

This was an oral counsel-to-counsel statement, and sometimes they suggested additional facts, orally.

Some of those conversations were with me and some were with my associates.

[12] MR. DODELL: I am reluctant to burden the record with this, but I feel I have an obligation to simply refer to the fact that the verification does state that it is on Mr. Byrley's knowledge.

I understand by inadvertence, this may not be something that is on his own knowledge, but I would point out the verification does so state.

MR. CHARLES RHYNE: Well, I would only add that I was talking to him constantly, others were, so I believe that these facts were brought to his attention by counsel, which is a usual way of bringing such facts to the attention of people under these circumstances.

I think he was justified in saying he knew these facts one way or the other, either from letters or from conversation.

Thank you.

THE WITNESS: I can supplement this by saying that I do know for a fact that my office, a specific individual has tracked this from the beginning, that he has talked with Arizona officials and can attest to this, the fact that he has verified the data, if that clarified the question.

[13] BY MR. DODELL:

A Mr. Byrley, do you know how many hours per week Arizona state police averaged in the fiscal year 1974-'75?

A No, sir. I suppose on any similar question in that regard, I would also give a negative response to. All I can attest to is I have every confidence in the people in

Arizona, public officials who put together this material.

There is no question whatsoever in my mind. I accepted it as being accurate.

I do not have the personal knowledge as to how many hours were given in given circumstances by police, or by fire, or any other specific question I suppose that you might put to me in that vein.

Q So, you don't know how specifically the state of Arizona and its Attorney General's office calculated this $1.5 million increase?

A No, sir, I do not. I have no reason to question that this is a budgetary process they go through as would be the case with the other 49 states. It is a very elongated process.

It is not unlike that of the Federal Government. [14] In fact, that budget process, I suppose, begins on July 1st, just as you are counting up either your surplus or your deficit as the case may be, as the fiscal year ends.

It is a continuing process.

Q Do you know of your own knowledge whether Arizona in coming to this conclusion took into account the exemption under the Act for executive administrative and professional employees?

A No, sir. I do not. Not unless it is stated here. I just don't recall. I have, as you might imagine, just in preparation for this deposition have inundated myself in reading. I personally am not the expert in this area, as I would assume the person interrogated yesterday – would have been the case.

The Governors' Conference as you know is, in terms of actually entering the litigation as it were, was a late entry. My own position as previously indicated, is that of

executive director. I cover the whole range of issues that are of concern to governors. This is obviously a very important one, but I have not immersed myself in the kind of detail, I think, that might well be desired for a record.

Q [15] And, Mr. Byrley, looking at paragraph 50, there is a reference to a $200,000 increase in the cost of providing health services. Is that found – look at Defendant's Exhibit 12, do you find a reference to that in the – in Defendant's Exhibit 12?

A Again, I would answer in the negative but I would probably, I think, provide the same response as I did previously with the total awareness of – I know of several telephone calls. How many precisely, obviously, I don't know – between my office and officials in Arizona. I am confident – even this letter states at least one telephone.

I am confident there must have been others by counsel with the officials of Arizona, with the answer to your specific question being no.

Q Do you have any idea how many hours per week were worked by people in the health services – state health services in Arizona?

A No, sir.

Q [16] Do you know how many hours per week are worked in highway construction on the average in Arizona?

A No, sir, but the – if I might – and I don't know – this is subject to your own wishes, I think I should point out that Mr. Rhyne – if Mr. Rhyne hasn't already, perhaps in my absence, just in the last 2, 3, 4 days I have received several communications, some at my own

solicitation or that of my office, and others which just came in naturally that tend to cover the kinds of data that you are now asking me about; but as you would look at those pieces of paper from the several states – and many more are coming – let me say – I could no more answer, you know, a specific question such as you have placed: how many hours for highway construction, or how many hours in social services, or what have you, for those states.

And I would be most happy to make those of record if that is proper, and if you want them.

I think some are perhaps more complete, some perhaps less complete than that which was provided by the single state plaintiff as of this point in time.

I could add, perhaps gratuitously, that although it is paragraph 50, and Arizona we are talking about at this [17] point in time, I have been reasonably assured by my own personal counsel inside the office that at least firm commitments have been passed along to the counsel for 4 additional states; and he expresses a confidence that this number will grow considerably in the very near future to become parties to the suit.

It is not viewed as being prudent, nor do I, to attempt to identify until the action obviously takes place.

My point is simply to say that you will find, I suspect, in the preliminary correspondence that is provided, as was the case with Arizona, the same kinds of very generalized data.

I personally can't support, except again to say that I have no reason, because I work with these people day in and day out and in a generalized sense. I am not the Arizona Highway Commissioner. At one time I could tell

you how many hours in Kentucky, because I was the Deputy Commissioner of Highways, as you may have observed. I don't hold that position now.

Q So I think it follows from what you have said that other than the – what is said in the letter, you don't know how Arizona calculated the $2 million – $2-1/2 million [18] figure that is specified in paragraph 50?

A No, sir.

Q Do you happen to know what the total payroll is of the State of Arizona?

A I think I have records here that would show it. I do not know it off the top of my head. If it's permissible, I will make a search in a few minutes to see – if it's important.

Q Would it be readily available? if not, we can look for it later.

A Well, I guess I don't know. I think probably it is found in – perhaps Bill or Rick might wish to start searching. I think it may be found in this here (indicating).

MR. CHARLES RHYNE: You are referring to public employment –

THE WITNESS: You are talking about the total personnel budget or the total budget?

BY MR. DODELL:

Q I was asking about the total personnel budget.

A Okay.

Q We can move on while they are looking.

A I think it is possibly in that.

[19] MR. CHARLES RHYNE: I think, Mr. Dodell – I don't have my copies because I gave them to you yesterday, those Department of Commerce –

THE WITNESS: This happens to be – there are two or three. This is public employment in '73, the last year for which data is available, at least in this form.

I have the Arizona budget, for example, in my office. I just don't carry those –

MR. CHARLES RHYNE: I gave this – Mr. Byrley, I gave that to Mr. Dodell yesterday. He has it.

BY MR. DODELL:

Q Now, with regard to paragraph 44 of the complaint, at page 20, down about 2/3 of the way in the paragraph there is a sentence that reads, "Allowing for overlap between these groups and calculating the average increase from the data gathered, the minimum impact for the first year on fire personnel budgets nationwide is estimated at a minimum of $200 million."

Now do you know how that $200 million figure was arrived at?

A I believe – back in the context – that this is the study done by the International City Management Association [20] and by the gentleman in California, Danielson.

I recall taking a very close look at that overall study at the time that it was first made available to me. I was quite impressed with it and with his work and his seeming knowledge of the whole field.

Again, to answer your very specific question, do I know how precisely he arrived at $200 million? No, sir.

Q Well, is it your understanding that that $200 million figure was in the study, in the ICMA study?

A Again the study I think is of record here. I don't know personally whether the figure is in there or not.

MR. DODELL: For the record, my recollection of the

testimony yesterday is that the figure is not in the study.

MR. CHARLES RHYNE: And we said we would get the way it was arrived at and give it to you. We will say the same thing with respect to Mr. Byrley here. We will get it for you.

MR. DODELL: All right. The same would be applicable, I take it, to the last sentence of that paragraph which refers to increased costs for other essential state and city governmental functions are reasonably certain to amount to billions of dollars per year due to the impact of these 1974 amendments [21] to the Act?

I take it the same is applicable, that you are not familiar with the way in which that was figured out?

THE WITNESS: I think perhaps this may be a difference or distinction without a difference. I think I am better prepared to address myself to that, because first of all, this is a more generalized figure, when one speaks of billions.

I am personally convinced, in reading the entirety of the brief that has been placed before you, and as I talk with state people generally, or as my shop does and they report to me, as I see the letters that I had reference to earlier, which I would be happy to make available to you if it is proper – and when I get that general view of figures that are being projected, and having only heard from perhaps maybe 10, 12 states, I am not quite certain what the number is, as a matter of fact – yes, I feel quite confident that that's an accurate statement, that it's going to be in the billions, as it were.

BY MR. DODELL:

Q Could you state how that figure specifically is arrived at?

A [22] As I have said previously, not unlike Arizona, I do not how Florida arrived at whatever it did; I don't know how California – which is – I was told would be telecopied to me today. I am sure it will be a large figure.

The specific methodology, the specific means by which one could even for that matter determine is beyond comprehension; and that is so in my judgment because of things like that (indicating).

Q When you point –

A This specifically (indicating).

I don't know how anyone could project anything based on what it has today from the Department of Labor.

MR. CHARLES RHYNE: You are referring to the Code of Federal Regulations, part 29, parts 500 to 1899?

THE WITNESS: Yes, sir.

BY MR. DODELL:

Q Did you ever sit down with a pencil and paper and do calculations that led to a figure of billions of dollars?

A No, I have people that have. Well, I can answer that in the affirmative, as a matter of fact. That goes back to days when I held other positions, as you may have noticed in my résumé, which I think is not relevant to your question.

[23] I have not sat down personally with that, no. I have people in my shop who do it every day.

I carry Title 19, the infamous Medicare program, that was found to be such a great program, it would cost a fairly infinitesimal sum; it was very nominal, a great program.

The State of New York alone spent every dollar that was available in the first year of the program. The

program was designed for 50 states.

Q Did you ever review the figures by which this billions of dollars was arrived at?

A You speak of these billions here? (Indicating)

Q Yes. The specific – just so the record is clear –

A I think so. I don't know how better to answer the question.

Q Excuse me.

Just so the record is clear, I am referring specifically to the sentence, "Increased costs for other essential state and city governmental functions are reasonably certain to amount to billions of dollars per year due to the impact of these 1974 amendments to the Act."

The specific question I am asking you is: have you [24] ever seen a sheet of paper that indicated sources of increased cost that had dollar amounts for each increased cost and a total figure of a certain number of billions of dollars?

A May I ask you, sir, is that again in the context of the '74 amendments? Or is that in the general context?

Q I think it was a very specific question.

Could you read it back, please?

(Whereupon, the Reporter read from the record as requested.)

THE WITNESS: May I interpret the question in the total context, as you put it?

The answer to the question is no.

MR. CHARLES RHYNE: While we are on the subject of payrolls, we have located in what we had marked as Exhibit 6-A on public employment 1973, the total payroll of Arizona for 1973. That's the only information we have. This is one of the documents I gave you late

yesterday.

MR. DODELL: As I read this, I gather the figure then is for the state government of Arizona, $23,241,000; is that correct? State government only?

THE WITNESS: That's my interpretation of the table.

[25] MR. DODELL: Thank you very much, Mr. Rhyne, for providing us that.

MR. CHARLES RHYNE: Would you want to mark that so you know what we are talking about?

MR. DODELL: I think you have identified it. If you want to make that an exhibit – I don't see the need for it at this point. Either of us can refer to it in briefs.

MR. CHARLES RHYNE: Yes, we can ask that judicial notice be taken of it.

MR. DODELL: Mr. Rhyne, before we came – we started questioning Mr. Byrley, you asked us for the basis of the $27 million figure that appeared in the regulations?

MR. CHARLES RHYNE: That's right.

MR. DODELL: What I would call the interpretive bulletin.

The facts on which it is based, whether it applies to states and cities or just cities – and I said I would see whether we can furnish that and let you know on Thursday morning whether we could supply it, and if we can't supply it we will file it at the same time as your brief.

Yesterday and today we asked questions about the $200 million figure and the billions of dollars figure that [26] appear in paragraph 44. I would ask if you can provide the same type of information that you have asked us for with regard to the $200 million figure and

the billions of dollars figure, namely the facts on which they are based.

MR. CHARLES RHYNE: I stated yesterday I would furnish you the information with respect to the $200 million figure; and I assume we can furnish what facts we have with respect to this generalized statement at the end of the paragraph 44. But as I say, we are operating under the same problem you are mentioning earlier.

Everybody seems to be gone over the Christmas holidays. We will get it to you as quickly as we can.

MR. DODELL: Thank you very much, Mr. Rhyne. My recollection is that yesterday I made the request with regard to both figures.

MR. CHARLES RHYNE: We will do the best we can.

THE WITNESS: I wonder if I might make an observation in that regard?

MR. CHARLES RHYNE: Usually you wait for questions, but I am sure if you want to make one, go ahead.

MR. DODELL: Within reason and if it relates to what we have been talking about.

[27] THE WITNESS: It's a redundancy in part, I guess, on my part; and that is the certainty of understanding the state budgetary process, which in my judgment is far superior, and I think most people would agree, to that to which our federal friends are accustomed.

Again, it's a continuous process. These things just don't happen. Arizona's didn't just pick out of the air somewhere figures and say they happen to be – whatever they happen to be. Nor did they do it or are they doing it in California, or New York, or any state in the nation.

It just so happens that I believe this to be true: I think the 49 governors – I think every governor except the Governor of Kentucky, will appear fairly shortly now, in the next – within a month, before his legislature and will present a total state budget either for a full fiscal period beginning next July 1, or for a biennium, whichever may be the case.

I have worked, as I have indicated, shown, extensively for quite a period of time in state government. I feel I know it fairly well. We are not talking about people who don't know their business. We are talking about very sophisticated budget people, very sophisticated analysts that [28] work with whatever they have to work with, albeit sometimes not so good, as a matter of fact.

If they haven't presented or prepared to present either to their governor or their governor-elect by now some fairly sophisticated figures of the impact of the '74 amendments, I somehow have for pity for them. I think that's important.

BY MR. DODELL:

Q The fact remains that with regard to Arizona, you don't know how they –

A I personally do not know. I indicated that previously.

Q [29] Mr. Byrley, Mr. Rhyne was kind enough to provide us with the letters that you have referred to from nine states.

Can we have these marked, please, with the next numbers?

I will keep them in the same order you had them in. Wyoming will be 39; Maryland, 40; Missouri, 41; Arkansas, 42; Florida, 43; Iowa, 44; Vermont, 45;

Washington, 46; and Utah, 47.

(The documents referred to were marked Defendant's Exhibits 39 thru 47 for identification.)

MR. DODELL: I take it, Mr. Rhyne, that we can stipulate these letters which you have given me today relate to matters not specifically addressed in the complaint; is that correct?

MR. CHARLES RHYNE: Yes. I would say except the overall impact.

BY MR. DODELL:

Q Addressing ourselves first to Defendant's Exhibit 39, as I read this, the state of Wyoming, through [30] its governor, has written to you by letter of December 20, 1974, that the unanticipated cost of extended – expanded overtime pay coverage will equal $2,415,103 for the period May 1st, 1974, through the fiscal biennium, 1975 through '77.

This letter was dated December 20. Were the facts in this letter known to you at the time you verified the complaint, Mr. Byrley?

A No, sir. That would be true, I am quite confident –

Q I am sorry. I didn't hear the end of the answer.

A Well, the answer is no. This letter was not.

Q The facts in the letter were not known to you?

A No, sir.

Q And I take it from your prior answers that you don't know how Wyoming calculated the figure of $2,415,103?

A No, sir.

Again an observation: When I see, 2,415,103, it shows again a high sophistication and not just a figure out of the air.

Q [31] You mean the fact that it isn't a round number shows that it is – shows sophistication in preparing the figure?

A I think so, yes, sir.

Q Turning to Defendant's Exhibit 40, which is a letter from Marvin Mandel, the governor of Maryland, to you, and this states in part, "I have been informed by the Maryland Department of Personnel that overtime regulations governing Maryland's state employees substantially conform with the provisions of the Fair Labor Standards Act relating to overtime compensation."

So far as you know, this is accurate, I take it?

A By the same token, any other statement in this letter or the others I have answered in the affirmative, yes.

Q And again I take it that you don't know how Maryland calculated the last sentence of that paragraph which says it is our judgment that full compliance with the overtime provisions of the Fair Labor Standards Act will require – will result in an additional annual expenditure of approximately $2.25 million?

A No. I do not know how that was calculated.

Q Again this letter dated December 20, 1974, were [32] the facts in that letter known to you at the time you verified the complaint?

A No.

Q Now turning to your letter – excuse me, turning to the letter of Perry A. Roberts, executive assistant of the state of Missouri, which is Defendant's Exhibit 41, October 28, 1974, this states in the first sentence that it is a reply to a special letter regarding the proposed Department of Labor rule concerning salary levels to be

used for mimimum wage exemptions. Was that a general letter sent to all governors, the letter that's referred to?

A I am inclined to think so. If I remember correctly – and I cannot attest to this – if I remember correctly, there was a letter to all governors out of my office, either under my signature or not, that talked about the salary means test, or whatever that was.

Q Was there any kind of a general letter that went out of your office to all the governors that asked them to report back the impact that the Fair Labor Standards Amendments would have?

A Not to my knowledge. I think, as I have previously indicated, the – most of these letters, I assume, [33] that carry dates of December 20 or thereabouts – this one does not, it does refer to a specific letter that presumably, and I believe came from my office.

But to my knowledge, and to my recollection, there was not a blanket inquiry or request made of my office to all governors to at this point in time measure impact, no, sir.

Q Mr. Rhyne, would it be possible for us to get a copy of that special letter that this letter is a reply to?

MR. CHARLES RHYNE: I am certain it will. I will undertake to get it and give it to you.

MR. DODELL: Thank you very much.

THE WITNESS: If it exists. I have not said it does. I make an assumption.

MR. CHARLES RHYNE: We will look.

BY MR. DODELL:

Q Do you know whether these letters that seem to cluster around December 20 resulted from a specific effort to get information from the states around that

time?

A Well, very definitely. This is a very concerted effort. I can't suggest any particular rationale for a selection of states. My guess is maybe as many as 20 states, [34] 25 states may have been contacted. I am confident it was by telephone; and I am equally confident that probably it was for one person, which accounts for the way it clusters, to use your term, around certain issues.

Q You think perhaps as many as 20 or 25 states were contacted?

A That would be my idea. It is a sure guess.

Q Do you know whether any states declined to furnish any of such information in response –

A I have no knowledge of any declinations. It has never been mentioned to me.

Q Do you know whether any states indicated that there was a negative – no impact?

A I have no such information and no one ever suggested that, no, sir.

Q But in any event, if 20 or 25 were contacted, it appears that only some nine have responded at least to date; is that correct?

A I haven't seen today's mail. We speak of holiday seasons and other things. I am confident that a very high percentage of those contacted will on a fairly timely basis get us some data.

[35] When I speak of timely basis, I keep in mind that tomorrow is Christmas Day, and a week later is New Year's Day. It will take longer, given that time of year, than otherwise would be the case.

Q I think you may have alluded to this. Do you know how the 20 or 25 states that you referred to were

selected?

A I think it was just random – as random in all probability as one could imagine. I am confident as can be there was no rationale whatsoever. It is who you know or who answered the phone the fastest or who you think would respond the fastest.

I think that perhaps was the way it was done.

Q Mr. Byrley, this act was adopted on April 8th, 1974. How do you account for the fact that a concerted effort to obtain this kind of information didn't occur until, as I understand it, late December 1974?

A How come there was not a concerted effort on my part? Or at least the part of the organization?

Quite frankly, I must confess – and I do this quite reluctantly – I don't think the National Governors Conference – and I accept full responsibility for it – [36] really tracked the legislation as well as it should have. I think that answers clearly as far as the organization is concerned. We don't like to admit to those things. Occasionally we err.

Q You were aware of the act's passage, I presume?

A I am aware of the act. I am aware of amendments almost every year, it seems. I am sure that's not true. I would point out, totally parenthetically – and my counsel may stop me, I don't know – but my being in this town as executive director of the National Governors Conference is due in large part, in my opinion, because of failure for someone to have tracked the amendments of 1966.

It looms very large in my mind, because I can hear all kinds of governors just raising all kinds of Cain, if you will, both for the substance, I suppose, of the

amendments, as a point in time, but perhaps equally important – I just don't really know – equally important, possibly of not knowing. That's a problem we live with even now.

Q Mr. Bryley, in the case of the 1966 amendments, are you aware that 27 states participated in litigation [37] to try to set aside? Are you aware of that? In a court case?

MR. CHARLES RHYNE: Mr. Byrley is not a lawyer.

MR. DODELL: He still may be aware of the fact.

THE WITNESS: I guess I would ask the question – answer the question by answering one; is that Maryland versus Wirtz?

MR. DODELL: Yes.

THE WITNESS: I guess that makes me a lawyer now. I have heard of it. I don't know its findings.

BY MR. DODELL:

Q Do you know a lot of states participated in that litigation?

A I was not aware of that. I really was not.

Q Turning to Defendant's – I am sorry. Excuse me. We are on Defendant's Exhibit 41. I went off to another area.

I am really not sure I understand what is being said here by Mr. Roberts in this letter. Is it your reading he is attributing this 1.5 million –

MR. CHARLES RHYNE: 3.1 million.

MR. DODELL: I will come to that.

[38] BY MR. DODELL:

Q The 1.5 million, that deals with executive, administrative and professional categories who he finds not to be within the exemption? Is that your

understanding of this?

I am not sure I understand what is being said here.

A I make that assumption, but I can't state it to be a fact. I, too, am slightly confused. I think it would probably require going back again to the letter that exists or doesn't. That might give a clue to that.

Q And referring to the 1.5 million and the 3.1 million, which Mr. Rhyne alluded to, again you don't know the detail of how these figures were arrived at?

A No. You would have to know the first figure to know definitely the second one, it seems to me.

Q And this letter was dated October 28. Was this a letter known to you at the time that you verified your complaint?

A No, sir.

Q Now, turning to Defendant's Exhibit No. 42, which is from the state of Arkansas – and this is addressed [39] to you – as I read this letter – and am I correct? – it appears to deal exclusively with executive, administrative and professional employees; is that correct?

MR. CHARLES RHYNE: You are referring to the first paragraph where he says, "United States Department of Labor proposed wage rate changes for executive, administrative, and professional employees would impose a tremendous financial burden on the state of Arkansas. . ." and then he goes ahead and says, "many employees now exempt would be subject to overtime."

MR. DODELL: The next sentence talks about these employees – we can both pause to read the letter. My quick reading is it appears to relate only to executive, administrative, and professional employees.

MR. CHARLES RHYNE: Well, I don't quite read it

that way. I guess it speaks for itself.

THE WITNESS: I guess I can't either gain that particular interpretation.

BY MR. DODELL:

Q I am sorry?

A I said I guess I can't gain that interpretation either, at least not to the same degree that you apparently [40] can.

Q Well, as Mr. –

A Again an observation, if I may, the – one, the – I am sure this is probably true in many, many offices, the fact that I am shown as the addressee doesn't necessarily mean that I would have been the actual recipient of the letter. That certainly was the case in this instance.

So I guess the answer to one of your next questions is no, I was unaware of this letter at the time the complaint was verified.

What I wanted – the observation, though, was that it seems to me – and I could be totally in error – it seems to me that the secretary wrote to selected individuals, all governors, maybe a larger audience somewhere in this time. Something tells me – and again I would have to verify this, and perhaps I can't, but something tells me this responds to a communication from the Department of Labor in some way, not addressed to them, but telling me what they told the Department of Labor.

I can't relate – I guess what I am trying to get at, I can't relate to this in the context of myself or [41] even my shop, for that matter, having sought this kind of data at that point in time.

Q Unless it relates, I would presume, to the other special letter?

A The subject matter doesn't seem to mesh. We will see.

Q All right. I guess we will have to look for that other letter.

MR. CHARLES RHYNE: I think the regulations that came out on the 20th of December refer to the fact that the Secretary of Labor did write to the governors about those regulations.

THE WITNESS: There may be a linkage there.

BY MR. DODELL:

Q What I was referring to was an earlier letter that said this is in response to your special letter. That one dealt with these professional, administrative employees.

MR. CHARLES RHYNE: We will see.

BY MR. DODELL:

Q This Arkansas letter, am I not correct, makes no specific reference to any dollar amount?

A [42] That's correct.

Q Now turning to Defendant's Deposition Exhibit No. 43, the first sentence of the third paragraph puzzles me because it speaks of money for hospitals and mental institutions, the first – why don't we say that whole paragraph?

I am sorry. Let me withdraw that observation.

MR. DODELL: Would you indulge me a moment?

(Discussion off the record.)

MR. DODELL: This may be backing and filling. I do want to ask a question about the third paragraph.

BY MR. DODELL:

Q It is correct, is it not, that the 1966 amendments related to hospitals and expanded coverage of the Fair Labor Standards Act to state hospitals?

Given that fact, can you – do you understand what the significance of that paragraph is to the 1974 amendments?

A I am not at all certain that I can. In fact, just before leaving the office this morning to come here, I raised essentially the same question with a person in our shop who has not been our key professional to work [43] the issue that is dealt with in there.

I personally again am not that familiar even with what happened in '66. I do know that it made the distinction as between educational institutions and what we regard as general, other employees. I don't know whether there are any classes or categories within that. I am not that familiar with the '66 amendments.

I would admit to personally having been slightly confused, because I don't really understand what is being said. I had problems with the figures as a result of that.

Q And –

A May I add to that comment – and this, to me, again is what is so incomprehensible as I look at everything that I can see, at least, in context:

That is that a sovereign state, the state of Florida, a state that has made some tremendous strides, in my judgment, in recent years, I think, in upgrading its whole administrative capacity and what-have-you can – I guess any way you read this, if it be a mistake – how it could make such a mistake.

Again I guess I have to refer back to a communication, information systems. How do people know if a [44] state legislature – this is what is being said here – appropriated 500,000, irrespective, I think, of our interpretation here, they had to – this had to be done, it seems to me, in

what I would call gross error; and that usually stems, invariably stems just from bad information. I don't understand.

I guess we go back to working from the book that is built for industry or somebody.

MR. CHARLES RHYNE: You are talking about Exhibit 6(a) again?

THE WITNESS: Yes, sir.

MR. CHARLES RHYNE: Part 29.

THE WITNESS: It is a very confusing – very confusing to state officialdom. I am sure it must be the case of local officialdom; and it extends obviously beyond the Fair Labor Standards Act of 1974.

It is my view that the department – at least in this instance here, it would appear to be quite apparent, is not doing a sufficiently effective job to cause them to understand if in fact they have made an error. I don't know that they have.

With no intent on my part to filibuster, I think [45] maybe the next paragraph is more important than any other part of the letter.

Again not being able to personally account for how they estimated the cost of $800,000 annually, if record keeping costs do amount to those kinds of figures, and they have means for having determined that, I think we are in for one big, big problem.

BY MR. DODELL:

Q Well, is it your understanding that the record keeping is – that it results with regard to states, is more onerous than with regard to other businesses that have been covered by the act since 1937?

A I would have no idea. I could not possibly respond

to the question.

Q And other businesses, including small businesses, have been required to comply with record keeping provisions since 1937; that's correct, isn't it?

MR. CHARLES RHYNE: He wouldn't know that; he's not a lawyer.

MR. DODELL: He might know.

THE WITNESS: Well, I don't know it, unfortunately.

[46] BY MR. DODELL:

Q Do you know whether states are required to keep records with regard to the 1966 amendments that extended coverage to hospitals and educational institutions?

A I do not know. The answer is no, I do not know.

Q Well, let me –

A May I comment further on the question?

Perhaps I do know and don't realize it. I am again reminded of 1967 when I opened the office for the governors conference which was referenced earlier in discussion among the governors at that point in time, venting considerable frustration on their part.

I recall – I guess two basic complaints. One was a dollar impact, and secondly, and seemingly to me, as I recall it, almost equally important, was what they called something like a double standard of dealing with employees and of record keeping.

If I heard correctly, then I guess they are responsible for that administration, that record keeping. I recall very distinctly a discussion of double standards in dealing with the general employee situation.

Q What do you mean by double standard?

A [47] The act dealt – of course, again I don't know

the specifics of it, but partly based on – I guess most of what you said, and partly what was in one of these letters, I don't recall which exhibit – that it dealt with hospital employees, either all – I just don't know, but hospital employees, and with, I guess, educational institutions. These are state employees. I think that's true invariably in every state.

The only question I have here at all is in certain educational institutions, particularly in what I call the big ten – I am not quite certain about the state university relationship – but that exception aside, if in fact it is one, does present a problem, it seems to me, if you are having to function somehow for one kind of employee differently than you do another kind of employee.

This was the – and again this is a recollection going back to 1967. Keep that in mind. It was programmed such as that in the whole raft of what then was known as the Great Society programs, one a day, as they were saying, and venting that kind of frustration again was what prompted their saying, well, A means – I don't know what B means, but A means keeping abreast of some of the Washington [48] developments, having a resource of our own.

Thus again the establishment of the governors conference.

Q I am not sure I understood one aspect of what you said. You mean the governors were concerned that some employees were covered by the Fair Labor Standards Act, and some were not?

A They were going through the same process as we appear to be now. There was total confusion is what I am trying to indicate. I don't know even the resolution of it,

much less the – they were trying to understand – and I will use some of their language – you can imagine some of it, there was total frustration.

We were talking about the whole raft of legislation, not the Department of Labor, although I suspect it had its share of it, I don't know.

Again to use the parlance of some of the governors, a program a day. There was absolutely no information, no means of even knowing what it is that now has been adopted by the federal government, much less intelligent guidelines or approaches to implementation; and what I am saying, it was the interpretation of some that there were [49] double standards.

There were difficulties in knowing even what to do, much less how to do it. The ultimate result, I don't know.

Q Are you saying there was similar confusion in 1966 that you are saying exists now?

A Yes, I am saying that. To a much lesser degree, in my opinion.

Q To a much lesser degree?

MR. CHARLES RHYNE: Now or then?

THE WITNESS: A much lesser degree then than now.

BY MR. DODELL:

Q You did say you thought there was great confusion then?

A Yes.

Q And the governors were all referring to it at the governors conference?

A No. Several governors.

Q Several governors were referring to it?

A Talking about that and – pick a figure, 10,000

others, if you will.

I mean what I am trying to describe for you is [50] total frustration on their parts; and I don't know whether it is 50, or 40, or what.

In fact, there was even a special meeting in December of 1966 to talk about the Fair Labor Standards Amendments of 1966; that's where two governors are talking. I am talking about the whole raft, again, if you will, of legislation that had occurred in a period of two, three, four years, a vast barrage of it.

I think perhaps we can both agree to it, that there was – which has nothing to do with the merits or the value of that legislation or those programs.

Q In 1966, several governors were complaining about the confusion that was caused by the Fair Labor Standards Act Amendments of 1966; is that correct? You were aware of that?

A Yes, that is true.

Q And yet in the case of the 1974 amendments, you said that it wasn't until relatively recently that you started to get this information about impact?

A I said we have done a poorer job. We tracked it. This is professional competence. As I have indicated previously, I feel that we didn't do as good a job as I [51] would like to have done.

Q Did you receive expressions of concern from governors between April and October or November of this year about the Fair Labor Standards Act Amendments of 1974?

MR. CHARLES RHYNE: Could we take a brief break?

(Recess.)

[52] THE WITNESS: To answer your question, I

simply can't imagine that I haven't, and yet I must confess that I can't recall a conversation with the governors.

BY MR. DODELL:

Q Okay.

A I can't conceive of it, again because of the magnitude in which we deal. There are just a few things that occur that at least a governor, if not several don't raise with me, what does it mean, what would I do about it.

Q In the nature of your position, Mr. Byrley, if there had been substantial expressions of concern by the governors about these amendments after April 8th, I assume because of the responsibility of your position, they would have made some impact upon you, is that a fair statement?

A Well, I don't know. Let me – one thing you have not asked me, and I think wasn't necessary at all, one thing among many I am sure – is the Governors' Conference itself and its structure and what have you. I don't know whether it is important, or relevant.

One point is, I think, in the context of your question: That is that the Governors' Conference [53] reorganized following a full year's study which was culminated by adopting revised articles of organization last March, last March 7th, as a matter of fact, at which time my own position changed.

That is when I was selected to become actually the first executive director of the organization. In that period of reorganization – and in fact it is continuing – which accounts in some part, in some measure for what I might suggest is something less than I would desire in tracking

and monitoring and reporting on several activities including the Fair Labor Standards Amendments of 1974.

I now have in place – I am very pleased to note – a director of state-federal relations; he has a unit that works specifically with the Hill on the one hand, he has a number of special assistants that work directly with him on problematic issues.

I think that possibly can give you a better feel for why I can't answer quite as directly as you might imagine certain questions that you have placed, because my concern is an overall concern.

I worry about state services. I have run a school, if you will accept the term, for the newly elected [54] governors, a two and a half day seminar for them, not to acquaint them with the Governors' Conference, but to acquaint them as best I can, and my staff, and others – well, I say others, and experts from around the country, including former governors, including academia, what have you, to advise them as to what – say, so now you are governors, so now what are you going to do?

That is a considerable digression, except to point out the dimensions of my total responsibility. The key point is in a period which happens to run somewhat parallel to the period of time we are talking about here, we have undergone considerable changes as an organization.

BY MR. DODELL:

Q My concern is this: that according to your testimony in 1966, the governors were very concerned about the impact that the Fair Labor Standards Act Amendments of 1966 had?

A Yes. They were concerned about the lack of

knowledge and still were, even as of that point in time. That is the point that I was trying to establish. I stated it differently than I would want to state it, as I just now stated it.

[55] It wasn't an ultimatum. Even today I don't know what the result was. I am saying they were concerned about programs a good bit of which is hearsay. I don't mean the bill itself. You can read that and interpret it any way you wish to. I am talking about, specifically about the Department of Labor in this instance.

Certain governors not feeling that they really had a full complete understanding of what those amendments did, what they were, how they might be implemented, et cetera.

That's what I think I have reference to.

Q Did you say that your recollection of 1966 was that there were governors who were concerned about record keeping and about double standards in the specific Fair Labor Standards Act area?

A Right.

Q And I think you said several governors expressed concern in 1966 or 1967?

A I think several governors – I don't know what is "several," first of all. If I make a statement in this room or a larger one, a larger setting, where I express some venom, if you will, almost in a much larger context [56] now of a whole raft of federal programs that I can't even learn about, and I use the Fair Labor Standards Amendment of that year as an example, and perhaps there were many others.

My point was, it just came to my mind – and it sort of stuck as it were, and the point is quite singular. It was to

illustrate confusion on their part. Confusion which I insist continues today.

We are now in 1974. The point in my mind is quite minor.

Q In 1966 governors were concerned about the Fair Labor Standards Amendments sufficiently, so that eight years later you remember the expressions of concern that they expressed?

That is true, is it not?

A Yes. And I am confident that if I were seated with Casper Weinberger and either – having a deposition taken, or just in conversation, I am confident I could come up with several programs that might pertain to him or his predecessors as it were.

Q Then along comes a Fair Labor Standards Amendments of 1974 which had some – are you aware it had some [57] fairly substantial legislative history? I think there was an enactment, a veto, and a subsequent legislation?

Are you familiar with that history?

A The last recollection that I have, vis-à-vis the amendments of '74 at about the point in time of the conference reorganization that I referenced earlier, were statements, quite general in my own shop, of people expressing complete confidence that those amendments would be vetoed by the President.

I think I distinctly recall – and I may be in error about this – but I distinctly recall either from staff or reading the newspapers or what have you, recommendations to that effect of both – well, the Secretary of Labor – I lose track of time here, as to – maybe that is a factor or it isn't.

I am not saying it is. I am simply recalling that to be a fact.

Q But then –

A My point is my positions changed. That is not to say that I shouldn't have kept that in mind. Again, that is – if I should have, that is my problem.

My point is that the conference reorganized. My [58] job, if you will, changed only in the sense that it is an overall responsibility with a much broader mandate than it ever had before, and I have personally devoted – and I think quite properly, almost an inordinate amount of time to a mission that I think has been under attended for too long perhaps.

That is doing such things as I mentioned earlier, and the only reason for having mentioned it, and that is the seminar for governors elect. I think that is important.

I take a lot of my time to visit with governors individually, to learn – and here I learn, you know, of all kinds of problems. My own focus has been – because the answer more often than not is – it obviously goes back to the question.

My concern is state capacity. It reflects my own background I suppose, in part.

Q Mr. Byrley, my focus isn't on you and what you did. My focus is on the governors' reorganization on April 8th. I assume that governors or their staffs pay some attention to matters that may have some significant impact upon their states.

Now, in your verified complaint, the allegations [59] are made that increased costs for state and city governments are going to increase billions of dollars as a result of the 1974 amendments; and my question to you

is: Would it not seem reasonable to expect that if this were to be the impact, that governors would have immediately contacted your organization or made their views known to you shortly after April 8, 19 –

A And I have not suggested that they have not done so.

Q Excuse me.

A I answered, if I recall correctly, that I couldn't imagine that not having occurred, words to that effect. I think it is quite important again that one understands a switching of hats or what have you.

Now, what I mean by that is there may be two, three – I don't know – people in my shop whose state must not be – not quite different, but yes, I recall governors – whom every – yes, we talked about this when I was out in "X" state.

All I can answer is what I know, and I am saying my own attention has not been in that regard. I first became very much back in force, if you will, in a total state-federal [60] spectrum, if you will, and particularly here when the executive committee of the Governors' Conference took the action that it did vis-à-vis this lawsuit.

Q When was that?

A It was November 16th, if that is a Thursday. I don't have a calendar.

MR. CHARLES RHYNE: I should tell you the letter that was delivered to me is another one of the letters. This is from Governor Reagan of California.

I will give you a copy of that, Mr. Dodell.

MR. DODELL: Thank you.

MR. CHARLES RHYNE: It is a letter dated December 23rd.

MR. DODELL: May we mark this –

MR. CHARLES RHYNE: He says it will cost him $16 million.

MR. DODELL: This is Exhibit 48.

(The document referred to was marked Defendant's Exhibit No. 48 for identification.)

THE WITNESS: That meeting was November 14th.

BY MR. DODELL:

Q [61] As Executive Director of the National Governors' Conference since March 1974, would other members of the staff bring major matters that might pertain to the National Governors' Conference to your attention? Would that be the customary practice?

A I would hope so. Again, I have to give an answer that I hope you will view as adequate. It is true.

What happened in March of 1974 with the reorganization was, as I indicated, a tremendously, in my view, new and increasing mandate.

That same action – they increased their dues level by exactly 90 percent, which is something we never heard of in days like this, which I think again shows their new commitment to getting a job done, which is neither here nor there.

My problem, however, is that that dues increase was not voted to become effective until July 1st of next year, 1975.

Now, sir, I think you begin to see my problem, that I am still trying to cover the world, as it were, the whole new mandate. I have spent quite a bit of time in trying to do that, with in effect and in fact fewer [62] staff than I had on entry to this reorganization.

MR. CHARLES RHYNE: Could we have a short recess?

MR. DODELL: Sure.

(Recess.)

BY MR. DODELL:

Q We were last on Exhibit 43, and at the bottom of the letter, in handwriting – and I guess it is signed by you, it says Mr. Anderson called as promised. Figure is $5,560,773.03. And I presume that you don't know specifically how this figure was reached?

A No, sir, and the call was not made to me. It was made to an assistant.

Q And if you will forgive my being facetious, in light of a previous answer, is it your view that the fact that it says three cents lends sophistication to the figure that is given here?

A Well –

Q You don't have to answer that if you don't want to.

MR. CHARLES RHYNE: I will so stipulate.

BY MR. DODELL:

Q [63] Turning to Exhibit 44, which is from Iowa, here again the letter refers to additional state expenditures of from $3 million to $3.5 million annually; and you don't know specifically how these figures were arrived at, I presume; is that correct?

A No. I think that whole paragraph is important.

I am sorry.

A It reads, "Our budget analyst in the Office of the State Controller advised me that –" blah, blah, blah; my point being the budgetary process, which is why it is only now that these figures are coming into play.

Q You don't know what effect if any the budget

analyst gave to the exemptions for professional, executive, and administrative employees?

A No, sir.

Q Looking at – is this the Governor, Mr. Salmon?

A Yes, sir.

Q Looking at Governor Salmon's letter, one thing that strikes me is that this letter is somewhat more detailed than some of the others and at the same time the total figure is $825,000, which appears smaller than some of the others.

MR. CHARLES RHYNE: The small state of Vermont.

[64] BY MR. DODELL:

Q I suppose Vermont is a small state, but then again perhaps some of the others were also small states.

Do you draw any inference from the fact that Vermont is more detailed and perhaps comes up with a small figure?

A He is a member of the Executive Committee that made the decision to enter the lawsuit. He is better informed personally, in my judgment. He is well informed, let me say.

Q Having read these letters, would you make a judgment that these figures seem smaller comparatively or relatively than some of the other figures that we have seen?

A I just don't recall the other figures. I suppose we will see some larger and smaller.

Q Now, for example, this letter seems to state administrative cost is $35,000, whereas Florida, I believe, stated them as $800,000. You said that Governor Salmon is well informed and a member of the Executive Committee. Do you think his are more realistic than the

Florida figures?

A No. I would not make that assertion.

Q Now one of the points that is talked about here, is compensatory time as resulting in increased costs.

Here I would like to ask you a general question, [65] Mr. Byrley: is it your opinion that the Act would irreparably injure states because of the effect on what you call compensatory time?

MR. CHARLES RHYNE: If you look at page 2, in the first full paragraph, it talks about compensatory time. I assume that's what you have reference to, Mr. Dodell?

MR. DODELL: I did mean to refer to that. I did try to ask a more general question as to the general allegations in the complaint regarding compensatory time.

THE WITNESS: Well, compensatory time alone, is that your question?

BY MR. DODELL:

Q In paragraph 27– and what I am trying to do is ask the more general question based on the fact that this particular letter from Vermont refers to compensatory time. Paragraph 27 talks about compensatory time.

MR. CHARLES RHYNE: And he is referring to paragraph 27 of the complaint on page 13.

THE WITNESS: I would want to hear the question again.

BY MR. DODELL:

Q Isn't it one of the claims of the governors' [66] conference that the fact that the Act eliminates what you call compensatory time, inflicts irreparable financial injury on the states?

A Yes, it is one.

Q It is one of your contentions?

A Yes, sir.

Q Now, I will say in passing that we explored this at some length yesterday; and I have an example that I think will indicate the question that I have.

I think it's easiest to treat the issue in terms of a hypothetical case, if I may.

Let's say there is an employee whose normal work week is 40 hours and he makes $2 an hour; and under the Act in a normal week he would earn $80. If he works 48 hours in a week, he would receive the $80 plus $16 for the 8 hours overtime plus $8 for the time and a half, which would mean he would receive $104.

I have this written down. I will let you look at it afterwards.

Now, under the Act's provisions, as I understand them – and you can correct me if any of the premises of my question is wrong – at a later week, let's say 6 months later, [67] 4 months later, 2 months later, the employer could cause the employee to work 28 hours and not work 14 hours and pay the employee 56 hours.

The result would be that the employee would earn $104 for the overtime period and $56 for the short week which would result in a total cost of $160, or 2 weeks at the regular rate.

Now, if that is correct, then I would like you to explain, if you would, how the elimination of compensatory time results in an additional cost to the states, assuming that the employees were to receive compensatory time at the rate of 1-1/2 hours for each hour worked?

A We are going to be here longer than I thought we were.

MR. CHARLES RHYNE: Do you understand what he is saying at all?

THE WITNESS: I really don't.

MR. CHARLES RHYNE: If you don't understand it, don't try to answer the question. We went through a lot of hypothetical things yesterday and I don't think we got very far with them.

I would strongly recommend you not answer [68] hypothetical questions that you don't understand. Just stick right with the facts.

MR. DODELL: For the record, if you have no objection, I would mark my sheet of paper the next exhibit number.

MR. CHARLES RHYNE: You go ahead and mark it.

(The document referred to was marked Defendant's Deposition Exhibit No. 49, for identification.)

BY MR. DODELL:

Q Can you explain then why the elimination of compensatory time results in increased expense to the states?

A I thought perhaps incorrectly that someone in these letters did a fair job of doing that.

MR. CHARLES RHYNE: He was asking you about Exhibit 45 on Vermont. There is a discussion of compensatory time. I don't know whether that's the one you have reference to.

Is that it?

THE WITNESS: I suppose one might wonder why – about the hypotheses, and just look at that. Is the governor in error?

BY MR. DODELL:

Q [69] Well, what we are trying to understand is why

permitting an employee to work or requiring an employee to work a shorter week at a later time cannot legally accomplish the same result as giving compensatory time while at the same time comply with the Act and not cost the state any additional expense.

A Well, I think one is a subterfuge; and I think, two, employees have rights here just as they do under the basics of the Fair Labor Standards Act. It makes no sense to me.

Q The question I am asking, Mr. Byrley, is why would the method I have suggested result in any additional cost to the state?

A I don't think the question is appropriate or relevant. I think what is important is what Vermont thinks and what it wants to do.

Q Well, can you explain why the method I have suggested would not eliminate any increased costs to Vermont that is referred to on page 2 of the letter?

MR. CHARLES RHYNE: I think he has testified that he couldn't understand the method that you were suggesting; and that all he could talk about were these facts that the [70] governor of Vermont gave him. That was my understanding of his answer.

THE WITNESS: That is my answer.

BY MR. DODELL:

Q And you simply do not understand the question that I asked?

A No, I really don't. Moreover, as I have already said – at the expense of being chided by counsel for saying too much – I think that's for Vermont to decide; and it isn't just a question of dollars.

Q No, but all I am talking about at the moment, Mr.

Byrley, is the question of dollars; and what I am trying to ask you is why it costs the state a greater number of dollars to pay time and a half for overtime and require the employee to work a shorter work week later on than it does to give the employee compensatory time off and pay him the same salary in the two weeks?

A I don't accept your caveat. Again, this goes back to your example which I don't understand.

Q When you say –

A I stand on what the governor of Vermont said.

Q When you said you don't accept my caveat, what do [71] you mean by that?

A Your illustration.

Q Well, when you say you don't accept my illustration, do you mean that it's impossible –

A I don't understand it, quite frankly, and I have said so. I think certain assumptions perhaps are being made that we don't – I don't know what – that what you have suggested in fact can be done, much more whether one would wish that it be done.

Q Mr. Byrley having been related to state government matters for at least – well, I can't total it up, but it's well over 16 years, it may be 25 years –

A That's my total life.

Q Your whole work life?

A Right.

Q Is it impossible for you to conceive that a state could have somebody work 48 hours in one week, and then 28 hours in a subsequent week; is that an impossible situation to conceive of?

A I view it with extreme adversity. I think it would be viewed with extreme adversity by a lot of employers and

employees.

Q [72] Isn't that what compensatory time results in?

A No. Not in my opinion.

Q Doesn't compensatory time result in the man working 48 hours one week and 28 or 32 or whatever the number of hours in a subsequent week?

A It could on a given occasion.

Q Isn't that what it involves?

A No, sir; not at all.

Q What else could it involve?

A You are assuming a given class of employees, I think, at a given level which I think is not necessarily valid.

Q I don't understand what you mean. What assumptions are necessary – well, let's strike that.

MR. CHARLES RHYNE: It just seems to me, Mr. Dodell, that what he is saying is he can understand what the governor of Vermont has said, and he thinks the governor of Vermont has correctly reported the facts; and so I think that the various assumptions and hypothetical questions that you have put have probably been at least to me and to him a little more confusing than clarifying.

He does certify that he thinks these facts that [73] the governor has reported are accurate. Isn't that what we are looking for here rather than a hypothetical situation? We are looking at actual facts that the governor reports as compared to hypothetical facts which are difficult to understand.

MR. DODELL: I would rather not debate with you, Mr. Rhyne. I would rather try to pursue it a moment.

MR. CHARLES RHYNE: All right.

BY MR. DODELL:

Q I asked you, isn't the situation where an employee is given compensatory time that he works, for example, 48 hours in one week and then 28 or 32 hours or whatever figure in a subsequent week?

MR. CHARLES RHYNE: He answered that question under certain circumstances. He answered that. So you don't need to ask the same one again. The record will show he answered it.

MR. DODELL: All right. If I may have forgotten the answer, is that your answer, yes, under certain circumstances?

THE WITNESS: Yes.

BY MR. DODELL:

Q [74] All right.

Now, do you acknowledge that in some instances compensatory time is provided at the rate of 1-1/2 hours for each hour overtime worked?

A I am sorry. Do I acknowledge that state governments presently – is that –

Q Do you acknowledge that in some circumstances, state governments provide compensatory time at the rate of 1-1/2 hours compensatory time for each hour of overtime worked?

A I guess I am dated in my experience here. I think they do, but I can't testify to that as a fact.

Q But you think they do sometimes, at least, or some states, at least in some circumstances, provide 1-1/2 hours compensatory time?

A That's my supposition.

Q For one hour overtime?

A That's my supposition, yes, sir.

Q If that's the case, would it not be true that if a man made a salary of $2 an hour, and he worked 48 hours one week, then at a later week he could take – would work 28 hours or he might work 28 hours and receive $80 for the first week, and $80 for the other week, for a total payment of $160?

A [75] Counsel, you didn't tell me to bring my computer.

MR. CHARLES RHYNE: Well, I certainly can't compute it. I am trying to urge that he stick with the facts rather than all this supposition business.

Maybe we could move on.

MR. DODELL: All right.

BY MR. DODELL:

Q [76] Mr. Byrley, could you explain the statement in paragraph 27 of the complaint which deals with compensatory time? That says – and this is about – it starts nine lines down.

"It avoids the meaning and wasteful make-work projects during slow periods. It allows the employer to most efficiently deal with many areas of government which involve peak employment problems."

Could you explain that?

A I think I can at least in part. There are, I guess, so-called down periods of time. If it suits the employee to take compensatory time rather than to engage in meaningful work, then that would seem to make sense.

I think that's what is being said here if I interpret it correctly.

Q All right.

Why can't the same results that are spoken about in those two sentences be achieved by paying overtime at

peak periods and giving time off without pay at subsequent periods?

A I think these kinds of things are always negotiable with the employee, so I will give you the [77] same answer as was said earlier. Under certain circumstances, I think that would be entirely feasible; under others, it probably would not be.

Q Now referring back again to Exhibit 45, do you know what the average hours of the Department of Highway employees of Vermont has been since May 1, 1974?

A No, sir, I do not.

Q Now do you know any of the details about the lawsuit that is referred to at the second full paragraph on page 2?

A That's the suits against the state?

Q The suit against the state.

A No, sir, I do not.

Q Do you know whether the state is making any contentions in that suit that are similar to the claims in this action?

A I have no knowledge whatsoever of that except as this letter from the governor points out.

Q Now turning to the letter that is Defendant's Exhibit 46 – and this is a letter from Governor Evans of Washington – and it is dated November 15, 1974. Did you know about this letter when you verified the complaint?

A [78] No, sir. And this is in the category again with some others we talked about. It must be responding to a communication from the Labor Department.

Q This is a letter to the Labor Department, as a matter

of fact?

A Yes.

Q And this letter, as I read it, refers solely to volunteer firemen; is that correct?

A I believe that's correct.

Q And – I have nothing further on Exhibit 46.

I take that back. As I read Exhibit 46, there is no dollar figure in Exhibit 46; is that correct, as to an estimated cost?

A That's correct.

Q Now with regard to Exhibit 47, which is the letter from Utah, other than what's stated in the itemization that is in the attachment to the letter, you have no specific information as to how those figures were arrived at; is that correct?

A That's correct.

Q And I take it you don't know what the average work week of the Highway Patrol is?

A [79] No, sir.

Q Now this letter from Governor Reagan dated December 23, am I correct that there is no details stated in the letter to support the figure of $16 million that is stated in the letter?

A I guess I don't have that.

MR. CHARLES RHYNE: This is the one that just arrived.

THE WITNESS: Yes.

MR. CHARLES RHYNE: One-day mail service. It probably came on a telecopy machine.

THE WITNESS: No, there is no supportive figure.

BY MR. DODELL:

Q Thank you.

Now, Mr. Byrley, there are states that have statutory

provisions that deal with wages and hours of pay of cities and other governmental subdivisions; is that correct?

A That's correct.

Q Do these provisions inflict irreparable injury on the cities or on the other subdivisions of the state?

A I think I personally am not aware of any such [80] allegation.

Q Why don't they inflict injury, irreparable injury upon the cities or other subdivisions?

A I must assume they are equitable. They are subdivisions, of course, of the state.

Q So equitable –

A Even if there were inequities, I guess, would be my point. I don't suggest that there are.

Q So equitable regulation of hours and wages of city and other subdivisions of states, employees, don't inflict irreparable injury upon those subdivisions as long as they are equitable?

A I did not answer that way.

MR. CHARLES RHYNE: You are trying to draw a distinction between the federal government and the states now?

MR. DODELL: I am trying to ask questions and elicit answers.

MR. CHARLES RHYNE: I see what you are doing. I just want him to understand it.

THE WITNESS: I see it, too. I didn't answer the earlier question.

[81] BY MR. DODELL:

Q I don't want to misstate what you said.

A I said, number one, I was unaware of any such allegation. I spoke of equity and I spoke further it

wouldn't make any difference, anyway, because there are subdivisions of the state quite different than the relationship of the state to the federal government.

Q Is it your opinion that having had your whole working life in state government, that state provisions that regulate hours and wages of employees of cities and other governmental subdivisions inflict irreparable injury upon those cities and other subdivisions?

A No, sir.

Q It is your opinion they do not?

A That's correct.

Q And the reason for that is because they are equitable; is that what you have said?

A I did not say that. I am not aware of any allegation of any inequity, I said.

MR. CHARLES RHYNE: He also said that after all, a state can do what it wants to do with its own political subdivisions. They are part of the state. You [82] don't have a question of equity, really.

BY MR. DODELL:

Q Mr. Byrley, you are saying it doesn't matter if –

A I would say –

Q Let me just try to finish it.

You are saying it doesn't matter if the state regulation would inflict irreparable injury upon the state or the subdivisions, because the state or the subdivision is subordinate to the state?

A I am saying we do not have the Constitutional issue that is obvious and inherent and implicit in the question.

Q Well, Mr. Byrley, you can explain your answer, but it seems to me that you can try to answer the question. I think you already said it –

A I think it is hypothetical, as I have indicated.

MR. CHARLES RHYNE: He has answered it two or three times, really, the best anybody could answer such a question.

MR. DODELL: Thank you, Mr. Rhyne.

[83] BY MR. DODELL:

Q Now, why were those statutes thought necessary?

MR. CHARLES RHYNE: Now you are covering, Mr. Dodell, an enormous area of state law; and to have him explain why every enactment of a state relating to state personnel is necessary is a long, long story. Really I don't see that it is relevant to this lawsuit. He's not a lawyer; but if you insist upon an answer, I will let him answer the best he can.

MR. DODELL: Well, Mr. Rhyne, just to respond, I could have given an answer that would be shorter than your observation. It may not be accurate.

Could I suggest what it would be? Mr. Byrley can agree or disagree.

MR. CHARLES RHYNE: Okay.

MR. DODELL: Because the cities were not providing adequate wages or working conditions.

BY MR. DODELL:

Q Do you agree with that, Mr. Byrley?

A I don't agree or disagree. I am not qualified to answer the question. I understand the question. I am simply saying I am not qualified to answer it.

Q [84] You mean with 23 years, or your whole working life in state government, you can't express an opinion on that question why were these statutes deemed necessary?

MR. CHARLES RHYNE: Every one of them has a

different background, Mr. Dodell.

THE WITNESS: You find some with a Constitutional base, some with a statutory base. I worked with the legislature; and a given legislator, because of his feeling – not the body, his feeling of inequity, would seek, you know, to provoke Constitutional change, statutory change.

I don't feel qualified to give you the kind of answer that would satisfy you.

BY MR. DODELL:

Q Now we could find the page reference if we have to, in Mr. Pritchard's deposition, but Mr. Pritchard said that – and I am paraphrasing what he said, because I don't have the passage in front of me, that those statutes were merely politically motivated and without need.

Do you agree with that?

MR. CHARLES RHYNE: Each one of them was different.

THE WITNESS: Again I don't feel I can respond intelligently any more so than to the last question.

[85] BY MR. DODELL:

Q You can't answer that question?

A No, sir.

Q Just for the record, let me ask it again so we know what question you can't answer:

Were those statutes merely politically motivated and without need?

MR. CHARLES RHYNE: He says he can't answer it.

MR. DODELL: Fine.

BY MR. DODELL:

Q Do the wages that a state pays it employees and the terms upon which it pays its employees for overtime have

any impact on its tax rate?

A It is extremely doubtful in my judgment.

MR. CHARLES RHYNE: That's where it gets all its money.

MR. DODELL: Was that on or off the record, Mr. Rhyne?

MR. RHYNE: It can be on the record.

THE WITNESS: Would you repeat the question?

MR. CHARLES RHYNE: I am not sure he understood the question.

[86] BY MR. DODELL:

Q Do the wages that a state pays to its employees and the way in which it handles payment of overtime compensation to employees have an impact on the state tax rate?

A I see very distinctly a cause-effect relationship, and I think that's what it is.

Q In other words, if the wages are higher and if there's greater compensation for overtime, then the tax rate might go up?

A If other considerations brought about the tax increase. I think it works both ways.

Q [87] Now, do some states seek to attract new industry and new residents and for example, retirees?

MR. CHARLES RHYNE: You are speaking of the state itself as distinquished from groups within the state? You are talking about state government, for example?

MR. DODELL: Yes.

MR. CHARLES RHYNE: As distinguished from individuals promoting retiree developments and things like that?

MR. DODELL: State governments.

THE WITNESS: I think the state government per se, essentially no. If it were even partially yes, it is the most indirect – it would come in the most indirect form.

BY MR. DODELL:

Q Haven't you ever seen advertisements from the state of "X" or "Y" to consider relocating in that state?

A I might have seen one. I don't – again, I take your question as a very broad and generally attributable to states. I don't know of any one state that ever failed to do anything.

It is part of the system, as it were. My answer would stand as I gave it. I don't view this as any essential functions or one that is carried out for that matter, [88] except in such a negligible degree that it sounds inconsequential.

Q But you have seen advertisements from states that do attempt to attract industry? Was that part of your answer?

A I can answer that I can very clearly vividly recollect one state advertising for industry.

Q Which state was that?

A Mississippi.

Q Now, are tax rates one element that is relevant to the choice that may be made by an industry or an individual to locate in a particular state?

A Not in my opinion.

MR. CHARLES RHYNE: Let's shorten up these answers. Let's let it go at that. Just let it go. I think on these advertisements you are going to find the chamber of commerce pays for it but they have the governors' picture on it.

MR. DODELL: That is not testimony.

MR. CHARLES RHYNE: Well, I lived in this field all my life, I know what goes on.

MR. DODELL: That may be , Mr. Rhyne, but that [89] is not testimony and the court can't take judicial notice.

If you want to document it, I would be pleased to receive the documentation.

MR. CHARLES RHYNE: No.

BY MR. DODELL

Q Why would a state –

A With that exchange, I would like to add a footnote, I don't know who paid for the ad from Mississippi.

Q Why would a state that pays its employees relatively high wages and premium overtime pay be interested in defending the authority of another state to pay relatively lower wages and not to pay premium overtime pay?

MR. CHARLES RHYNE: That is a very "iffy" speculative kind of a question.

Do you understand that? It just doesn't seem to me that any state would be doing what you are suggesting, Mr. Dodell.

MR. DODELL: Well, I don't understand that, Mr. Rhyne. The complaint alleges that the Governors' Conference is filing this suit on behalf of all of its members, which are 50 states. So, it seems to me that according to the allegations of the complaint, there are states that are [90] doing that, if that allegation is correct.

MR. CHARLES RHYNE: There is no allegation in there that the states that pay high wages are defending states who pay low ones and all that kind of thing.

MR. DODELL: I think that is the effect of the lawsuit, Mr. Rhyne.

MR. CHARLES RHYNE: This is your interpretation.

MR. DODELL: That is why I think it is relevant.

MR. CHARLES RHYNE: Well, I don't, but if he thinks he wants to comment, go ahead.

THE WITNESS: No comment.

BY MR. DODELL:

Q You mean you can't answer it? Just so the record is clear, we are going to have a transcript of this. I would like the record to be clear. You just don't choose to answer?

A It is not a matter of choice. I can't conceive of – it makes no sense to me, the question doesn't.

Q The question doesn't make any sense to you?

A No, sir.

Q Do you know whether all 50 governors support this lawsuit?

A [91] I don't know.

Q Could you explain the statement at the end of paragraph six of the verified complaint that the Conference brings this action on its own behalf and on behalf of its members?

A Can I explain that statement?

Q That is what I asked you.

A That is an action of the executive committee of the Governors' Conference.

MR. CHARLES RHYNE: All right. Now you have answered the question. I am trying to speed this up a little bit.

You have answered it, just stop there.

BY MR. DODELL:

Q Do you know whether – let me strike that.

And that is the entire basis of that statement, is that correct?

A Yes.

Q Have any governors indicated that they do not support this suit?

A No, sir.

Q On page nine of the complaint, in the last two [92] sentences the statements are made, "In providing these essential government services plaintiffs extensively used voluntary boards and commission whose members are not compensated –"

A I am sorry. I am not following.

Q This is the complaint, page nine. The last sentence in paragraph 16. The last two sentences.

A All right.

Q "In providing essential government services Plaintiffs extensively use voluntary boards and commissions whose members are not compensated or who are paid nominal compensation. The Act makes use of these voluntary boards, commissions, and workers financially impossible."

Now, the Act does not eliminate voluntary noncompensated boards, does it?

A I don't know.

Q Do you know whether the 1966 amendments resulted in a cutback of the government services that were covered by that Act?

A Would you repeat it again?

MR. DODELL: Would you read that back, please?

(The question was read as requested.)

[93] THE WITNESS: No, I don't know. I would like to – again, counselor, make an observation on the

previous question, where you asked me about the Act: Does it – and I will give – I gave you an "I don't know."

I should point out that it has been indeed several days, if not weeks, since I read that Act. There is a lot yet that I have to read. I think the question is really unfair almost to put any question to me, does that Act specifically allow this or that or anything else, particularly I would go back as I have done previously to the whole body, both of law and of regulations in the Department of Labor.

I think if I might respectfully indicate that it is somewhat unfair for me to be asked a question or no question in that respect.

BY MR. DODELL:

Q Well, there is no intention on my part to be unfair, Mr. Byrley.

A I understand.

Q I simply ask the questions that I think it is appropriate to ask.

MR. CHARLES RHYNE: You are not a lawyer. We understand that.

[94] MR. DODELL: I meant to say I didn't mean to put you in a position that is unfair.

I would like about a five-minute recess to consult with my colleague.

MR. CHARLES RHYNE: Fine.

(Recess.)

MR. DODELL: We have nothing further, Mr. Rhyne, and Mr. Byrley.

Thank you very much.

THE WITNESS: Thank you, sir.

MR. CHARLES RHYNE: Let's stipulate that without the depositions being signed, that they shall be filed with

the court right away, without either side waiving their right to make any corrections that they feel may be necessary and that may be either mutually agreed upon or presented to the court for decision.

We stipulate that the depositions and all the documents that have been marked and referred to here may be filed with the court for use of either party as they see fit.

MR. DODELL: Thank you very much for that.

Mr. Rhyne, can I just ask one thing? There is [95] a large volume of exhibits which we have not duplicated. Would it be agreeable to you to file the depositions and then as soon as we duplicate the exhibits file them? Would you want to withhold the filing of the depositions until we get the exhibit duplicated?

MR. CHARLES RHYNE: I would say we can furnish a set of our exhibits to the reporter so he can bind them right in with the record, at the time he files them.

MR. DODELL: You can do that now you mean? We still have to duplicate some of our exhibits.

MR. CHARLES RHYNE: All right. Suppose we furnish him our set of everything, and then you furnish yours when you can?

MR. DODELL: In the meantime, the depositions with as many exhibits as are there can be filed and we will supply the others as soon as possible.

(The documents referred to were marked as Joint Deposition Exhibits 4(a), (b), and (c), and 6(a), (b), and (c) for identification.)

(Whereupon the taking of the deposition was adjourned at 12:45 p.m.)

[Certificate omitted in printing]

Supreme Court, U. S.
FILED
MAR 6 1975
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-878
and 74-879

NATIONAL LEAGUE OF CITIES, *et al.* (in No. 74-878),
and STATE OF CALIFORNIA (in No. 74-879),
Appellants,

v.

HON. PETER J. BRENNAN, SECRETARY
OF LABOR OF THE UNITED STATES,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED JANUARY 17, 1975
PROBABLE JURISDICTION NOTED JANUARY 27, 1975

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METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
DEPARTMENT OF LAW
204 COURTHOUSE
NASHVILLE, TENNESSEE 37201

November 4, 1974

Mr. Charles S. Rhyne
General Counsel
National Institute of Municipal Law Officers
839 - 17th Street, N. W.
Washington, D. C. 20006

Dear Mr. Rhyne:

This acknowledges receipt of your letter of October 15.

You asked if the Metropolitan Government would experience a large increase in costs for Firemen and Policemen due to the Fair Labor Standards Act. From the best estimates available, we have concluded that the annual costs in the early stages of the implementation of the Fair Labor Standards Act for Policemen and Firemen would amount to approximately $938,000.00. This computation is based on no increase in the present compensation. Obviously, the implementation of the Fair Labor Standards Act is going to have a serious financial impact on the Metropolitan Government of Nashville.

If we can be of further service to you, please advise.

Very truly yours,

/s/ Milton H. Sitton
Milton H. Sitton
Director of Law

Defendant's Exhibit No. 2

METROPOLITAN GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY
DEPARTMENT OF LAW
204 COURTHOUSE
NASHVILLE, TENNESSEE 37201

November 25, 1974

Mr. Charles S. Rhyne
Rhyne & Rhyne
400 Hill Building
Washington, D.C. 20006

Dear Mr. Rhyne:

This refers to your letter of November 22 in which you enclosed rough drafts of the proposed complaint and brief to be filed in the U.S. District Court for the District of Columbia contesting the extension of the Fair Labor Standards Acts to governmental functions.

We note that you have shown Metropolitan Nashville, Tennessee; the correct legal name is The Metropolitan Government of Nashville and Davidson County, Tennessee. Please correct on the final complaint.

As you know, the Department of Labor has proposed definitions and rules for determing hours worked and what constitutes a work period with respect to employees of public agencies engaged in fire protection or law enforcement activities.

We have previously furnished you with an estimate of the financial impact that the Act will impose upon the operational costs of our Fire and Police Departments.

The proposed Rules, if enacted, would have a further effect on our Police Department and could affect the cost of operating our Fire protection. Section 553.8 of the proposed Rules, as we interpret same, would require the payment of overtime where a fireman or policeman is engaged by another public agency of some other state or political subdivision, or by a private employer and the work performed by the employee is not completely disassociated from his employment with the Metropolitan Government; for example, a policeman who is required to wear his uniform and performs services which would deter the commission of a crime; i.e., security guard at a bank. We estimate that 40% of our policemen work in positions requiring police authority. These police officers average at least 16 hours a week in this employment. If the proposed Rules become effective and we have interpreted the proposal correctly, it is possible that the Metropolitan Government would have to pay overtime on 16 hours a week. We estimate that this would cost us in round figures $19,000.00 per week, or a total of approximately $1,000,000.00 per year. This would seriously place a burden on the property taxpayers and might require the curtailment of some needed services.

Mr. Rick Bacigalupo asked for the above information. This, of course, is predicated on the approval of the proposed Rules.

Sincerely,

/s/ Edward W. McCabe
Edward W. McCabe
Deputy Director of Law

Defendant's Exhibit No. 3

International City Management Association

Management Information Service

SPECIAL
REPORT
JUNE 1974

The fair labor standards act: effects on fire overtime costs & staffing

Effective January 1, 1975, the federal Fair Labor Standards Act will apply to fire department and police department overtime practices. Many cities now are preparing budgets for the fiscal year July 1, 1974, through June 30, 1975. Also, many cities now are in the process of negotiating with representatives of firefighter or police groups. The new federal law may have very significant effects on both the budgeting plans of cities and negotiations of city management with police and fire groups.

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This special MIS report discusses problems and possible solutions in planning for the January 1, 1975, changes required by the Fair Labor Standards Act.

GOVERNMENT ADDED TO FLSA COVERAGE

Congress enacted a compromise version of the Fair Labor Standards Act placing federal, state, and local governments under the act on March 28, 1974. The President signed the bill on April 8, 1974, and it became effective May 1, 1974. Some changes in the new law will affect cities on January 1, 1975, and in subsequent years when the overtime provisions for fire and police take effect.

The Fair Labor Standards Act provides that the U.S. Secretary of Labor will issue a new regulation that will identify the policies and practices of the Department of Labor in regulating minimum wage and overtime provisions of the act for police and fire departments. It is not likely that the regulation will be issued by the Secretary until later in the summer of 1974 and almost certainly after July 1, 1974. As almost all cities that use a July 1 fiscal year must have completed budget preparations and negotiations with organized employee groups by that date, and as cities will not be able to know exactly what the Department of Labor regulations will be prior to July 1, this report is issued to help local government administrators plan in an uncertain area for the coming year. Local officials are specifically cautioned that the infor-

mation in this report may subsequently turn out to be inconsistent with the regulations to be issued later this year. When the Department of Labor regulation is issued, managers should obtain copies immediately and review local policy in comparison with the final regulation to make any additional policy changes necessary.

FIRE SUPPRESSION OVERTIME PRACTICES AND THE FLSA LAW

Effective January 1, 1975, fire overtime hours are mandated by federal law whenever hours on duty exceed an average of 60 hours per week, or 240 hours in 28 days, or any proportionate ratio of hours to days between 7 days and 28 days. Many cities in the United States presently have fire duty schedules averaging more than 60 hours per week. Any city will be free to continue to schedule firefighters for hours longer than an average of 60 per week. However, each such city will be required to pay overtime at time-and-one-half for hours worked over the 60 hours per week average.

A major unknown is whether, in calculating overtime hours, the Department of Labor will grant an exemption for sleeping and/or eating time for part of the hours spent in a fire duty period. Previous practice by the department has permitted an exemption of up to eight hours for sleeping time and additional hours for bona fide meal times which, if applied

in the fire service, could have the possible effect of exempting up to 11 hours out of a 24-hour duty period for the purpose of determining hours to be included in overtime calculations. A ruling by the Secretary of Labor regarding hours for which the minimum wage must be paid, issued in May 1974, requires that policemen and firefighters who are required to be on duty for 24 hours or less will use the Wage and Hour Division rule set forth in 29 C.F.R. 785.21. (This is the rule which previously applied to duty time of less than 24 hours.) Thus, for firemen with tours of duty of 24 hours or less, no time may be deducted for meals or sleeping. If this rule is extended and made permanent for calculations of overtime for firemen, it then would not be possible to exempt any sleeping or eating hours from overtime calculations. This report is written assuming the possibility that all scheduled hours will be counted for purposes of calculating overtime. Should the Secretary of Labor's regulations permit some exemptions for fire hours used for eating and/or sleeping, cities will have greater options in budgeting and negotiating with employee groups.

1975 REQUIREMENTS FOR FIRE OVERTIME

Effective January 1, 1975, overtime payment will be required for work over 60 hours average per week, or 240 hours in 28 days, or any proportionate ratio. For cities that use a 24-hour fire duty period, a "10-14" fire duty period, or a

"9-15" fire duty period, there are only two possible fire duty schedules between 7 and 28 days that are equivalent to an average of exactly 60 hours per week. In the examples listed, "X" equals a continuous 24-hour fire duty period. Most often a 24-hour fire duty period will begin at 8:00 a.m. and continue until 8:00 a.m. the following morning. An "0" indicates 24-hours off duty:

Five 24-Hour Fire Duty Periods in 14 Days
(60-Hour Average Fire Duty Week):

1	2	3	4	5	6	7	8	9	10	11	12	13	14
X	0	X	0	X	0	X	0	X	0	0	0	0	0

Ten 24-Hour Fire Duty Periods in 28 Days
(60-Hour Average Fire Duty Week):

1	2	3	4	5	6	7	8	9	10	11	12	13	14
X	0	X	0	X	0	X	0	X	0	X	0	X	0

15	16	17	18	19	20	21	22	23	24	25	26	27	28
X	0	X	0	X	0	0	0	0	0	0	0	0	0

These schedules would not necessarily be the exact ones that would be placed into effect by any given city. For example, on the five 24-hour-periods-in-14 cycle, it is not necessary to have five consecutive days off. On the ten 24-hour-periods-in-28 cycle, it is not necessary to have nine consecutive days off. However, normal scheduling of 24-hour fire duty periods provides for a 24-hour period off duty immediately following a 24-hour on-duty shift.

Many other options are possible in arranging five 24-hour fire duty periods in 14 days or ten 24-hour fire duty periods in 28 days. Two additional examples of each are shown below.

Five 24-Hour Fire Duty Periods in 14 Days
(60-Hour Average Fire Duty Week):

1	2	3	4	5	6	7	8	9	10	11	12	13	14
X	0	X	0	0	X	0	X	0	0	X	0	0	0

X 0 X 0 X 0 0 0 X 0 X 0 0 0

Ten 24-Hour Fire Duty Periods in 28 Days
(60-Hour Average Fire Duty Week):

1	2	3	4	5	6	7	8	9	10	11	12	13	14
X	0	X	0	X	0	X	0	X	0	0	0	0	0

X 0 X 0 X 0 0 0 0 X 0 X 0 X

15	16	17	18	19	20	21	22	23	24	25	26	27	28
X	0	X	0	X	0	X	0	X	0	0	0	0	0

0 0 0 0 X 0 X 0 X 0 X 0 0 0

Many combinations of on-duty and off-duty shifts are possible. The city administrator and fire chief should carefully structure the fire duty cycle to best meet the city's particular needs.

AVOIDING UNNECESSARY FIRE OVERTIME

City councils and local administrators no longer can afford the luxury of dele-

gating completely to fire departments the determination of the fire duty cycle. Any fire duty cycle less than seven days or more than 28 days in length will cost a city unnecessary overtime. For example, some cities presently have a fire duty cycle three days in length. This cycle calls for 24 hours on duty and 48 hours off duty prior to repeating. Even though this cycle is equivalent to an average of 56 hours per week, a city that maintains this particular cycle, beginning January 1, 1975, may be liable to pay unnecessary overtime every third week, as follows:

Three-Day Fire Duty Cycle

Sun.	Mon.	Tues.	Wed.	Thur.	Fri.	Sat.	
O	O	X	O	O	X	O	48 hrs.
O	X	O	O	X	O	O	48 hrs.
X	O	O	X	O	O	X	72 hrs.

In this example, in the first two weeks an individual firefighter would be on duty 48 hours each week, but in the third week he would be on duty for three 24-hour periods for a total of 72 hours. In that third week, the city would be liable to pay 12 hours of overtime at time-and-one-half. This kind of unnecessary overtime can be avoided by adopting a fire duty cycle at least seven days in length and not exceeding 28 days in length. Specific examples of duty schedules that can be adopted are listed in Table 1.

THE "10-14"

Fire groups have been able to legislate in some states the use of the 10-14 type of fire duty scheduling. The 10-14 basically is identical to a 24-hour period except that it is broken into two parts. Typically, the "day shift" is ten hours in length and most often begins at 8:00 a.m. and ends at 6:00 p.m. The day shift usually will include lunch, and usually sleeping is not permitted on this shift. The "night shift" is 14 hours in length, usually from 6:00 p.m. to 8:00 a.m., and includes dinner and sleeping time. Scheduled fire department activities, such as drills, are uncommon. Firefighters of course are on call to answer an alarm at any time throughout the day shift or night shift.

The 10-14 fire duty schedule requires an identical number of day shifts as night shifts. Basically, a 10-hour day shift and a 14-hour night shift are identical to a 24-hour fire duty period in terms of the amount of work-related hours and standby time. Typically, on either a 24-hour fire duty period or a 10-14, there is a maximum of eight hours of work-related activity and a minimum of 16 hours of standby time.

Examples of a 10-14 schedule that would average 60 hours per week over a 14-day or 28-day period are as follows:

D = day shift
(e.g., 8:00 a.m. to 6:00 p.m. -- 10 hours)

N = night shift
(e.g., 6:00 p.m. to 8:00 a.m. -- 14 hours)
O = off duty

(Text continued

Table 1

FIRE DUTY SCHEDULES FOR 1975

No. of Days in Fire Duty Schedule	Fire Duty Schedules	Average Fire Duty Week (Hours)	No. of 24-Hour Periods on Duty in Fire Duty Cycle
7	XOXOOOO	48	2 in 7
8	XOXOOOOO	42	2 in 8
9	XOXOXOOOO	56	3 in 9
	XOXOOOOOO	37.3	2 in 9
10	XOXOXOOOOO	50.4	3 in 10
	XOXOOOOOOO	33.6	2 in 10
11	XOXOXOOOOOO	45.8	3 in 11
12	XOXOXOXOOOOO	56	4 in 12
	XOXOXOOOOOOO	42	3 in 12
13	XOXOXOXOOOOOO	51.6	4 in 13
	XOXOXOOOOOOOO	38.7	3 in 13

No. of Days in Fire Duty Schedule	Fire Duty Schedules	Average Fire Duty Week (Hours)	No. of 24-Hour Periods on Duty in Fire Duty Cycle
14	XOXOXOXOOOOOOO	48	4 in 14
	XOXOXOXOXOOOOO	60	5 in 14
15	XOXOXOXOXOOOOOO	56	5 in 15
	XOXOXOXOOOOOOOO	44.8	4 in 15
16	XOXOXOXOXOOOOOOO	52.5	5 in 16
	XOXOXOXOOOOOOOOO	42	4 in 16
17	XOXOXOXOXOOOOOOOO	49.4	5 in 17
	XOXOXOXOXOXOOOOOO	59.3	6 in 17
18	XOXOXOXOXOXOOOOOOO	56	6 in 18
	XOXOXOXOXOOOOOOOOO	46.6	5 in 18
19	XOXOXOXOXOXOOOOOOOO	53.05	6 in 19
	XOXOXOXOXOOOOOOOOOO	44.21	5 in 19
20	XOXOXOXOXOXOXOOOOOOO	58.8	7 in 20
	XOXOXOXOXOXOOOOOOOOO	50.4	6 in 20
	XOXOXOXOXOOOOOOOOOOO	42.0	5 in 20

No. of Days in Fire Duty Schedule	Fire Duty Schedules	Average Fire Duty Week (Hours)	No. of 24-Hour Periods on Duty in Fire Duty Cycle
21	XOXOXOXOXOXOXOOOOOOOO	56.0	7 in 21
	XOXOXOXOXOXOOOOOOOOO	48.0	6 in 21
	XOXOXOXOXOOOOOOOOOO	40.0	5 in 21
22	XOXOXOXOXOXOXOOOOOOOO	53.45	7 in 22
	XOXOXOXOXOXOOOOOOOOO	45.81	6 in 22
23	XOXOXOXOXOXOXOXOOOOOOOO	58.43	8 in 23
	XOXOXOXOXOXOXOOOOOOOOO	51.18	7 in 23
	XOXOXOXOXOXOOOOOOOOOO	43.82	6 in 23
24	XOXOXOXOXOXOXOXOOOOOOOOO	56.00	8 in 24
	XOXOXOXOXOXOXOOOOOOOOOO	49.00	7 in 24
	XOXOXOXOXOXOOOOOOOOOOO	42.00	6 in 24
25	XOXOXOXOXOXOXOXOOOOOOOOO	53.76	8 in 25
	XOXOXOXOXOXOXOOOOOOOOOO	47.04	7 in 25
	XOXOXOXOXOXOOOOOOOOOOO	40.32	6 in 25
26	XOXOXOXOXOXOXOXOOOOOOOOO	58.15	9 in 26
	XOXOXOXOXOXOXOXOOOOOOOOOO	51.69	8 in 26
	XOXOXOXOXOXOXOOOOOOOOOOO	45.23	7 in 26

No. of Days in Fire Duty Schedule	Fire Duty Schedules	Average Fire Duty Week (Hours)	No. of 24-Hour Periods on Duty in Fire Duty Cycle
27	XOXOXOXOXOXOXOXOXOOOOOOOOOO	56.00	9 in 27
	XOXOXOXOXOXOXOXOOOOOOOOOOOO	49.77	8 in 27
	XOXOXOXOXOXOXOOOOOOOOOOOOOO	43.55	7 in 27
28	XOXOXOXOXOXOXOXOXOXOOOOOOOOO	60.0	10 in 28
	XOXOXOXOXOXOXOXOXOOOOOOOOOOO	54.0	9 in 28
	XOXOXOXOXOXOXOXOOOOOOOOOOOOO	48.9	8 in 28
	XOXOXOXOXOXOXOOOOOOOOOOOOOOO	42.0	7 in 28

BEST COPY AVAILABLE

60-Hour Average Fire Duty Schedule
"10-14" Shifts, 7- Through 28-Day Cycle

In the schedules below, assume that the schedule begins at 8:00 a.m.

14-Day Fire Duty Cycle (60-Hour Average)

1		2		3		4		5		6		7	
D	N	D	N	D	N	D	N	D	N	D	N	D	N
D	O	D	O	D	O	D	O	O	O	O	O	O	O

8		9		10		11		12		13		14	
D	N	D	N	D	N	D	N	D	N	D	N	D	N
O	N	O	N	O	N	O	N	O	N	O	O	O	O

28-Day Fire Duty Cycle (60-Hour Average)

1		2		3		4		5		6		7	
D	N	D	N	D	N	D	N	D	N	D	N	D	N
D	O	D	O	D	O	D	O	D	O	O	O	O	O

8		9		10		11		12		13		14	
D	N	D	N	D	N	D	N	D	N	D	N	D	N
O	N	O	N	O	N	O	N	O	N	O	O	O	O

15		16		17		18		19		20		21	
D	N	D	N	D	N	D	N	D	N	D	N	D	N
D	O	D	O	D	O	D	O	D	O	O	O	O	O

22		23		24		25		26		27		28	
D	N	D	N	D	N	D	N	D	N	D	N	D	N
O	N	O	N	O	N	O	N	O	N	O	O	O	O

DOL SURVEY OF 1975 FIRE DUTY HOURS

The Department of Labor will conduct a survey in 1976 to ascertain fire duty hours used by cities during the calendar year 1975. Local government administrators should insure that adequate records are kept of fire duty hours, cycles, and schedules of uniformed fire personnel during the calendar year 1975. The law passed by Congress requires the Secretary of Labor to use the information gathered on hours actually served on duty to determine administratively the maximum number of hours over which fire overtime will be paid beginning January 1, 1978.

Administrators can anticipate substantial demands by fire groups to lower fire hours for the calendar year 1975. The lower the average of fire duty hours is determined to be in 1975, the lower the hours over which overtime payment will be required for firefighters beginning in 1978. It is possible that beginning in 1978 the Secretary of Labor could determine that overtime will be required over 54 hours per week (as in 1977) or over a number of hours less than 54 hours per week. City administrators and city councils should recognize that reduction of fire duty hours in 1975 will affect significantly the number of hours over which overtime must be paid beginning in 1978. It is theoretically possible that the Secretary of Labor could determine that 52, 50, 48, 46, 44, 42 or even 40

hours per week--the goal of firefighter groups--could be established as the number of fire hours per week over which overtime must be paid.

1976 REQUIREMENTS FOR FIRE OVERTIME

Effective January 1, 1976, cities will be required to pay overtime for any hours over 58 per week, or 232 hours in 28 days. Therefore, to avoid overtime payments, cities using a 60-hour schedule will need to revise the schedule.

With the 24-hour fire duty period, the 10-14 period, or the 9-15 period, there are no fire duty schedules possible that are equivalent to 58 hours using a cycle of seven days through 28 days. The next lowest fire duty schedule possible arithmatically between seven days and 28 days is a 56-hour average schedule. The practical effect of the law enacted by Congress is to require a 56-hour schedule starting in 1976 rather than a 58.

A 56-hour fire duty schedule basically involves being on duty one-third of the time and being off duty two-thirds of the time. The basic ratio is simple: one on-duty hour or one on-duty day out of three. Therefore, to obtain a permissible schedule, it is necessary to devise a ratio of fire duty schedules using cycles of duties divisible by three. Between seven and 28 days, there are seven options of schedules as follows:

56-Hour Fire Duty Schedules
Between 7 Days and 28 Days

Three 24-hour periods in 9:
XOXOXOOOO

Four 24-hour periods in 12:
XOXOXOXOOOOO

Five 24-hour periods in 15:
XOXOXOXOXOOOOOO

Six 24-hour periods in 18:
XOXOXOXOXOXOOOOOOO

Seven 24-hour periods in 21:
XOXOXOXOXOXOXOOOOOOOO

Eight 24-hour periods in 24:
XOXOXOXOXOXOXOXOOOOOOOOO

Nine 24-hour periods in 27:
XOXOXOXOXOXOXOXOXOOOOOOOOOO

The lower the number of hours per fire duty week, the greater the variety of options in scheduling fire duty periods. Within each of the schedules shown above, a great variety of arrangements of on-duty periods and off-duty periods can be utilized. For example, a common optional scheduling of the four 24-hour duty periods in a 12-day cycle is as follows: XOXOOXOXOOOO.

Cities should avoid a 56-hour average duty cycle less than seven days in length or greater than 28 days in length in order to

avoid paying unnecessary overtime. Therefore, cities should not use a day cycle of 1 in 3 or 2 in 6, such as:

1	2	3
X	O	O

1	2	3	4	5	6
X	O	X	O	O	O

If these schedules are used, 18 hours of unnecessary overtime every third week may have to be paid for every firefighter--equivalent to six hours unnecessary overtime cost per week per firefighter. This would result in unnecessary overtime cost of 10.7 percent of the fire salary budget. Similarly, the use of a 56-hour schedule greater than 28 days will result in unnecessary overtime costs. Such schedules would be: ten 24-hour fire duty periods in 30 days, eleven 24-hour fire duty periods in 33, twelve 24-hour fire duty periods in 36 days, etc.

1977 FIRE OVERTIME REQUIREMENTS

Effective January 1, 1977, the Fair Labor Standards Act will require the payment of overtime for hours in excess of 54 hours per week, or 216 hours in 28 days. Only one schedule exactly fits this description. This is a schedule of nine 24-hour fire duty periods in 28 days, or nine 10-hour day shifts and nine 14-hour night shifts in 28 days. (Nine 24-hour fire duty periods equal 216 hours.)

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
X	O	X	O	X	O	X	O	X	O	X	O	X	O	X	O

17	18	19	20	21	22	23	24	25	26	27	28
X	O	O	O	O	O	O	O	O	O	O	O

"10-14"

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
D	D	D	D	D	O	O	N	N	N	N	N	O	O	D	D

17	18	19	20	21	22	23	24	25	26	27	28
D	D	O	O	N	N	N	N	O	O	O	O

Again, the above examples of 24-hour or 10-14 fire duty schedules for a 54-hour week may be rearranged in other ways. Managers and fire chiefs should be aware, however, that the 9-in-28 fire duty cycle is the only cycle that will yield an average duty week of 54 hours. Any other fire duty cycle will result in payment of unnecessary overtime or in the use of a duty schedule that averages less than 54 hours per week.

1978 REQUIREMENTS FOR FIRE OVERTIME

Effective 1, 1978, the Secretary of Labor is required by law to determine, based on the Department of Labor's survey to be made in 1976 of fire hours used in 1975, whether overtime shall continue to be paid for hours over 54 hours per week or whether a lower figure is required. If the Secretary of Labor determines that a lower figure is required, city administrators and fire chiefs should review carefully the duty schedule that then would have to be placed into effect.

The advent of Fair Labor Standards Act coverage to cities will require all persons concerned with fire suppression duty hours to think ahead not simply for one year but for the next four years. As the fire duty schedule hours over which overtime must be paid are reduced in 1975, 1976, 1977, and potentially in 1978, the great majority of fire duty schedules in American cities will have to be revised to accommodate the annually changing law and regulations. Even cities that presently have fire duty schedules significantly lower than the 60-hour limit that will go into effect on January 1, 1975, may find it necessary to review their schedules to avoid payment of unnecessary overtime. This is because many cities presently have fire duty cycles that repeat in fewer than seven days or repeat in a number of days larger than 28. It becomes necessary, therefore, for each city to determine exactly what the present practice is within the fire department in scheduling and using fire duty hours.

FIRE DUTY PERIOD

The city administrator should determine what is currently the exact practice as to the length of the fire duty period. Is the fire duty period 24 hours in length? When does it start and end? On occasion, city officials and city councils have been misled by schedules that show 16 hours one day and eight hours on the succeeding day. While technically correct in terms of a 24-hour calendar day,

such schedules usually involve 24 continuous fire duty hours from 8:00 a.m. one day until 8:00 a.m. the succeeding day.

FIRE DUTY CYCLE

City administrators should determine the exact fire duty cycles. Determination should be made to ascertain exactly how the fire duty schedule operates. A fire duty cycle can be as short as two days or as long as the entire calendar year. Some fire duty cycles may even require two or three years before repeating. Most do not exceed a period of 60 days, but many do. If the fire duty cycle is less than seven days or greater than 28 days in length, the cycle should be adjusted to be between seven days and 28 days in length in order to avoid the payment of unnecessary overtime. In devising an appropriate fire duty cycle when using a 10-14 or 9-15 schedule, there must be an identical number of day shifts as night shifts within the cycle.

"PAY BACKS"

Managers should determine whether the fire duty schedule includes "pay-backs." A pay-back is an on-duty period which a firefighter owes the city in addition to the duty periods in his regular day cycle. Pay-backs may be scheduled or unscheduled (e.g., sick leave, relief). When computing the average duty week, the number of pay-backs for each firefighter must be included in the total number of duty periods scheduled per week.

As an example, city X has a 60-hour fire duty week. However, the city is using a three-platoon schedule. The fire duty cycle is three 24-hour on-duty periods out of nine days. In this city, if the firefighters did not pay back any 24-hour duty periods in a year, they would have a 56-hour average duty week. On a 56-hour schedule, a firefighter will be scheduled to be on duty about 122 times per year. On a 60-hour average duty schedule, he will be scheduled to be on duty about 130 times a year. If the firefighter in this example is regularly scheduled to be on duty only 122 times, he must be scheduled, in addition, to serve eight more (pay-back) 24-hour periods in order to serve an average of 60 hours per week.

Some of the reasons pay-backs are used include ease of scheduling (a three-platoon system is easier to schedule than a two-platoon system with many subsections) and the fact that pay-backs enable fire administrators to have greater flexibility in covering time off, vacation, and sick leave. If pay-backs are used, it is important for city administrators to learn specifically when the on-duty periods firefighters owe the city actually are paid back. The new FLSA law probably will force the elimination of pay-back scheduling because of potential overtime liability.

PAID TIME OFF

Fire departments often grant paid time off to uniformed firefighters for holidays,

sick leave, injuries, and other purposes. Holidays many times are not granted directly but indirectly through the use of the fire duty schedule. As there is no standard practice in the granting of vacation, sick, or other paid leave, it is important in auditing fire duty schedule practices for city administrators to determine exactly in what units vacation, sick leave, and other paid time off may be taken. For example, is a day of vacation considered to be 8 hours, 10 hours, 12 hours, 14 hours, 24 hours, or what? Similarly, how many hours are credited to use as a day of sick leave? City administrators should determine how many 24-hour fire duty periods or 10-14 hour periods actually are scheduled per week and, secondly, how many of the duty periods hit on holidays. This information is absolutely necessary in planning for fire duty schedule changes which a city may need to make in planning for the impact of the FLSA on January 1, 1975, and succeeding years.

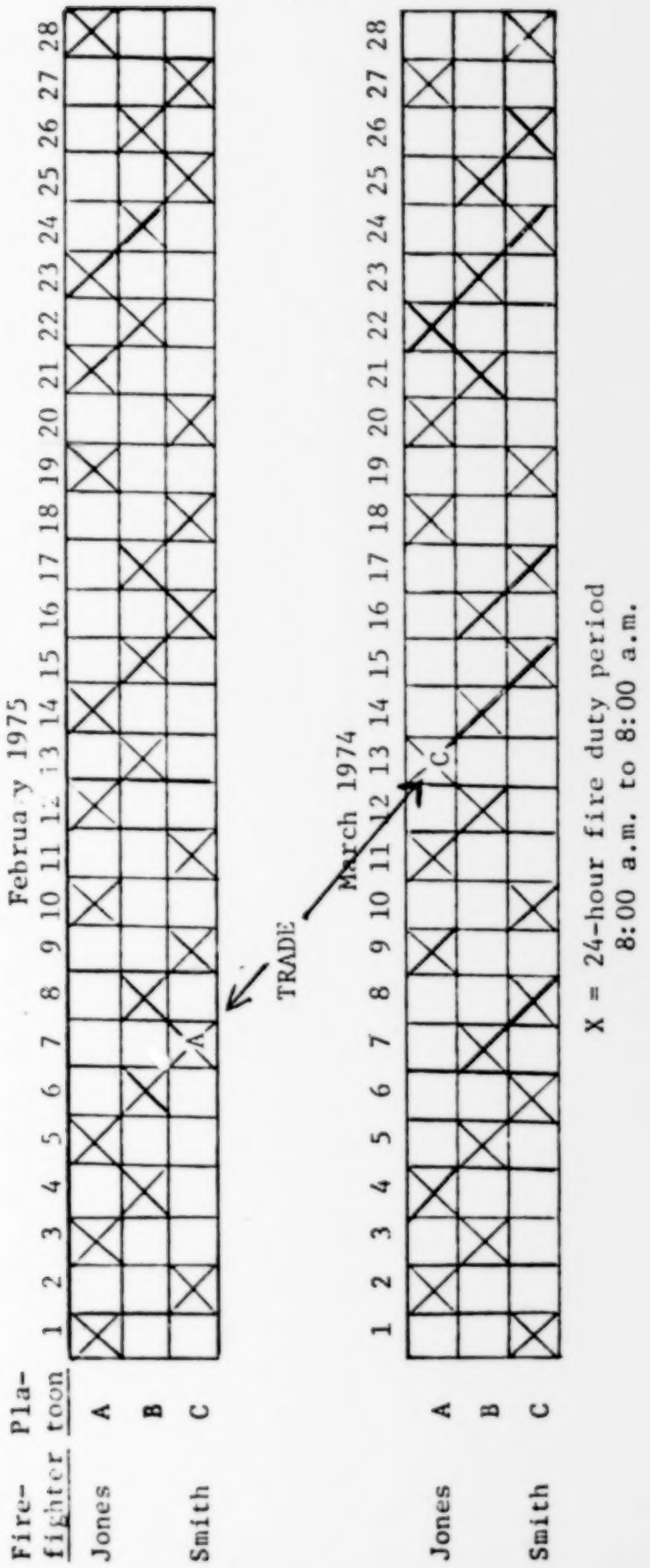
SHIFT TRADES

Firefighters assigned to fire suppression activity rarely come to work, on the average, more than three times per week. Fire duty schedules, because of the infrequency of periods on duty, permit a practice which is perhaps unique to the fire service--"shift trading." Typically, a firefighter on one platoon will "trade" one or more duty periods with a firefighter on another platoon. This practice enables individual firefighters occasionally to obtain a longer number of consecutive days off than the regular fire duty schedule otherwise would provide.

A very simplified example of shift trading is shown in the table at the top of page 10. In the example, assume two consecutive 28-day periods. For ease of identification, assume these to be February 1, to 28, 1975, and March 1 to 28, 1975. The fire duty period is 24 consecutive hours. The fire duty cycle is nine days in length. There are three platoons--A, B, and C. There are three scheduled 24-hour duty periods in every nine days, as follows: XOXOXOOOO. The average fire duty week is 56 hours--less than the 60-hour maximum mandated effective January 1, 1975.

Assume that firefighter Jones on A platoon has arranged a shift trade with firefighter Smith on C platoon. On February 7, the C platoon is scheduled to be on duty, and therefore firefighter Smith would be on duty. However, on February 7, firefighter Smith's shift is served by firefighter Jones, and firefighter Smith does not come to work that day. Instead, firefighter Smith has six consecutive days off between the end of the shift at 8:00 a.m., February 3, and the beginning of the shift at 8:00 a.m., February 9. This does not count as time off for vacation.

On March 13, the A shift is scheduled to be on duty. Therefore, firefighter Jones is scheduled to be on duty. However, on March 13, firefighter Smith serves in firefighter Jones' place and "repays" the shift trade. Firefighter Jones therefore



has six consecutive days off from the end of the shift at 8:00 a.m., March 13, to the beginning of the shift at 8:00 a.m., March 18. This does not count as time off for vacation.

In this example, two firefighters have each worked one 24-hour fire duty period on another platoon's schedule. They also have worked in such a way as potentially to be able to claim overtime under the new law. Each took time off in one 28-day "work period" and worked an additional 24-hour duty period in a different work period of 28 days. This may require the city as the employer to pay overtime to each firefighter--even though the shift trades were for the convenience of the employees involved and of no benefit to the employer.

In this example, each firefighter worked an extra 24 hours on duty in the 28-day work period. The fire schedule is an average of 56 hours per week. Therefore, in 28 days (four weeks) the federal law would assume an on-duty schedule of 4 x 56 hours or 224 hours worked.

On-duty schedule	224 hours
Shift trade "overtime"	24 hours
	248 total hours worked

Total hours worked 248

1975 fire overtime law -240

8 hours overtime at 1-1/2 equals 12 hours pay due to firefighter Smith and to firefighter Jones.

The Department of Labor regulations to be issued will contain provisions as to whether shift trades will penalize employers who permit them.

SHIFT TRADE RECOMMENDATIONS

Each city should identify its own practice in permitting shift trades. Some fire departments have no formal restrictions concerning this matter; others have stringent regulations. Some departments forbid shift trades. A city that ignores this matter may later find that it has incurred substantial overtime liability once the new law becomes operative on January 1, 1975. Probably shift trades that occur within a given 28-day work period will not require payment of unnecessary overtime. In the example, if firefighter Smith on C platoon had traded with firefighter Jones on A platoon within the 28 days in February (the 28-day work period), each firefighter would have served the same number of 24-hour duty periods as he would have on his regular platoon schedule. The problem will arise when firefighters trade shifts over periods of time beyond the 28-day work period.

City administrators and fire chiefs may well be advised to plan to withhold shift trade privileges for 1975, or to restrict shift trades within 28-day work periods, pending the issuance of the Department of Labor regulation on the subject. If shift trades are subject to negotiation with firefighter employee groups, persons responsible for negotiating for city management should consider either (1) stopping the practice of shift trades, (2) restricting shift trades to require prior approval of management to avoid payment of unnecessary overtime, or (3) leaving an "opener" in the agreement pending the DOL regulation being issued.

THE POTENTIAL FIRE OVERTIME "BOOBY TRAP"

In addition to all the problems of fire service costs and staffing that have been discussed in this report, there remains at least one unknown but possibly very expensive fire overtime problem that may occur because of the new federal law.

Section 7(a)(1) of the Fair Labor Standards Act states:

> "Except as otherwise provided in this section, no employer shall employ any of his employees...for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

The newly added Section 7(k) for police and firemen states:

"No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities...if (emphasis added)

"(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed 240 hours; or

"(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 240 hours bears to 28 days,

"compensation at a rate not less than one and one-half times the regular rate at which he is employed."

The term "work period" used in the new Section 7(k) above has a special meaning. Every employer covered by the act must declare what is the work period; that is, the days for record-keeping purposes in which the number of work hours will be counted. For almost all employers, the work period is seven days; the employer specifies at what point in the week the work period begins and ends (e.g., 12:01 a.m. Sunday through midnight Saturday; or 8:00 a.m. Monday through 7:59 a.m. Monday, etc.).

The new Department of Labor regulation will spell out what is meant by "work period" for firefighters. Cities may have many options in declaring what is the work period because of the provisions of Section 7(k)(2) above, which enable cities to use ratios in determining average fire hours per week. Therefore, a permissible work period might be 7 days, 8 days, 9 days, 10 days...27 days, 28 days. A city that fails to declare a work period potentially is very vulnerable to substantial "booby trap" unnecessary overtime costs, particularly a city that fails to readjust its fire duty cycle schedule to be between seven days and 28 days.

For example, assume a city now has a 56-hour average fire duty week. It uses a 24-hour fire duty period. It has three platoons. The duty cycle is three days. The duty schedule is 24 hours on-duty and 48 hours off-duty (X 0 0). Assume that January 1, 1975, comes and goes and the city has not changed its schedule or declared a work period for firefighters. Firefighters continue to work the same fire duty schedule in the year 1975 as in 1974. After a period of time, the booby trap explodes: City officials learn that the city is liable for overtime costs for time over 40 hours for every third week that firefighters have worked on the old schedule.

Where did this booby trap come from? The trap is the little word "if" in Section 7 (k). Section 7(k) is an exemption from the 40-hour week and from paying time-and-

one-half for hours worked over 40. In order to obtain the exemption, cities must comply with the provisions of Section 7 (k). Section 7(k) states that a city must pay a firefighter at time-and-one-half for hours worked over 60 hours in a work period of seven days, 240 hours in a work period of 28 days, or the same ratio to the number of consecutive days in his work period as 240 hours bears to 28 days.

If a city does not pay a firefighter time-and-one-half for hours worked in excess of 60 in a seven-day work period, etc., the city has not met the test of the exemption of Section 7(k) and, therefore, will be held in violation of Section 7(a) for the given work period. Section 7(a) requires overtime for work over 40 hours in seven days at time-and-one-half.

What would this mean for the city with the three-day fire duty cycle which has not declared its work period? Probably, on receiving a complaint from the firefighters' union or employee organization, or from individual firefighters, the Wage and Hour Division would conduct an audit of the city's wage and hour records. The Wage and Hour staff persons would find that every third week each firefighter was on duty three 24-hour shifts: XOOXOOX. Therefore, each firefighter served in those weeks 72 hours. As the firefighters were not paid overtime for work over 60 hours in each of these weeks, the city's exemption does not apply--and the city will be required to pay time-and-one-half for hours over 40!

72 hours every third week
-40 hour requirement (the booby trap)

32 hours overtime
x 1.5

48 hours overtime for each week

As the salary probably would be computed on a 40-hour basis, this could amount to more than double pay for every week in which this situation occurred! This could amount to more than a 40 percent of payroll cost for back overtime claims filed for a period of one year. A city with a $10 million fire salary payroll, for example, could find itself ordered to pay back overtime of $4 million. If "liquidated damages" were assessed (double costs), the bill could be $8 million. And all for firefighters on a fire duty schedule of less than the maximum required by law!

The new Department of Labor regulations will detail how to keep records, how to determine work period, and, in effect, how to deactivate the Section 7(a) booby trap.

THE WAGE AND HOUR DIVISION,
DEPARTMENT OF LABOR

The Department of Labor maintains regional and area offices throughout the United States. A list of these offices appears in the appendix.

Staff members of the Wage and Hour Division are available to assist city officials in any way possible to understand and to

comply with the law. City officials are advised to contact Wage and Hour offices to obtain answers to specific questions concerning the Fair Labor Standards Act.

It is the apparent intention of the Department of Labor to treat cities like any other employer, except where Congress has provided that special regulations are needed. Except in the new coverage provided in Section 7(k) for police and fire personnel, it is expected that almost all other provisions of the act will apply to cities as they have in the past to private employers. The Department of Labor Wage and Hour Division will make available to cities copies of DOL regulations that cities will need to observe.

Wage and Hour Division staff members at the national, regional, and area offices have been very helpful to city officials seeking information and assistance. Managers, fire chiefs, and other concerned with the special provisions of the law pertaining to fire or police overtime or other provisions and regulations of the act should contact the Department of Labor offices for help.

MIS REPORT TO BE ISSUED

This report is intended to help city administrators become aware of many of the problems raised by the new federal legislation. As the Department of Labor regulations pertaining to overtime will not be issued until the summer of 1974, many answers cannot now be provided to questions that city administrators and

fire chiefs may have. This report is intended, however, to serve as a guide in planning for budgeting and negotiating based upon the latest available information. By January 1975 a revised and updated MIS report will be issued on fire duty schedules and staffing for fire departments considering the impact of FLSA. By that time, the final Department of Labor regulations will have been issued, and much more specific information will be available for publication. In the meantime, the International City Management Association will present to the Department of Labor relevant statistics on duty hours of firefighters.

This special MIS report has been prepared to provide local government administrators with guidelines for avoiding unnecessary overtime costs for fire service under provisions of the recently enacted Fair Labor Standards Act.

The report was prepared by William F. Danielson, Director of Personnel for the City of Sacramento, California. Mr. Danielson formerly served as Director of Personnel for Berkeley, California. He has extensive experience in advising local governments on fire duty schedules and staffing and has authored an earlier MIS report on the topic.

Appendix

WAGE-HOUR AREA DIRECTORS

Atlanta Region

Birmingham, Ala.--Hansel J. Hunter, 1931 Ninth Avenue South, Birmingham 35202
Mobile, Ala.--Charles A. Roberts, P.O. Box 4396, Mobile 36604
Montgomery, Ala.--Dalton O. Blake, 421 S. McDonough Street, Montgomery 36104
Fort Lauderdale, Fla.--Area Director, Romark Building - Room 215, 3521 West Broward Boulevard, Fort Lauderdale 33312
Jacksonville, Fla.--Labon F. Chappell, Jr., 3947 Boulevard Center Drive - Suite 121, Jacksonville 32207
Miami, Fla.--Area Director, 1150 S.W. 1st Street - Room 202, Miami 33130
Orlando, Fla.--William C. Truman, P.O. Box 8024A, 22 West Lake Beauty Drive, Orlando 32806
Tampa, Fla.--Delbert L. Coleman, Mills Building - Suite 110, 5410 Mariner Street, Tampa 33609
Atlanta, Ga.--Le Roy Reid, Citizens Trust Building - Room 1100, 75 Piedmont Avenue, Atlanta 30303
Columbus, Ga.--Robert E. Lamb, P. O. Box 1717, Columbus 31902
Savannah, Ga.--William A. Savage, P. O. Box 8046, Wright Square Station, Savannah 31402
Lexington, Ky.--Ernest C. Orr, Fuller Building - Room 118, 120 W. Second, Lexington 40507
Louisville, Ky.--Richard D. Robinette, 187-E. Federal Building, 600 Federal Place, Louisville 40202

Charlotte, N.C.--Fred A. Carlock, BSR Building - Room 401, 316 E. Morehead Street, Charlotte 28202
Greensboro, N.C.--Raymond G. Cordelli, P.O. Box 2220, Greensboro 27402
Raleigh, N.C.--Area Director, P.O. Box 27486, Raleigh 27611
Columbia, S.C.--Richard F. Gardner, Room 105-C, Liberty House, 2001 Assembly Street, Columbia 29201
Jackson, Miss.--Joseph C. Massey, Room 675 Milner Building, 210 South Lamar Street, Jackson 39201
Knoxville, Tenn.--Lillard Trice, P. O. Box 631, Knoxville 37901
Memphis, Tenn.--Area Director, 486 Federal Office Building, 167 North Main Street, Memphis 38103
Nashville, Tenn.--Claiborne W. Carden, 1720 West End Building - Room 610, 1720 West End Avenue, Nashville 37203

Boston Region

Hartford, Conn.--John J. Reardon, 305 Post Office Building, 135 High Street, Hartford 06101
Portland, Maine--Philip Schilling, P. O. Box 211, Portland 04112
Boston, Mass.--William L. Smith, 38 Chauncy Street - Room 912, Boston 02111
Springfield, Mass.--James F. Coakley, Room 340 - Federal Building, 436 Dwight Street, Springfield 01103
Providence, R.I.--John S. Dawber, 210-212 John E. Fogarty Federal Building, 24 Weybosset Street, Providence 02903

Chicago Region

Chicago, Ill.--Herbert A. Goldstein, 4030 North Milwaukee Avenue, Chicago 60641
Chicago, Ill. - South--Daniel P. New, 2222 West 95th Street, Chicago 60643
Springfield, Ill.--Henry Neuhaus, Federal Building - Room 25, 600 E. Monroe Street, Springfield 64701
Indianapolis, Ind.--Kenneth J. Graue, Ohio and Pennsylvania Streets, Room 409, Federal Building, Indianapolis 46204
South Bend, Ind.--Area Director, 103 West Wayne Street, Commerce Building - Room 406, South Bend 46601
Detroit, Mich. - East--Arthur H. Buchman, 16641 East Warren Avenue, Detroit 48224
Detroit, Mich. - West--Frank C. Modetz, 14740 Plymouth Road, Detroit 48227
Grand Rapids, Mich.--Gordon L. Claucherty, Room 134, Federal Building and U.S. Courthouse, 110 Michigan Street, N.W., Grand Rapids 49502
Minneapolis, Minn.--Phillip Granquist, 110 South 4th Street, Room 396 - Federal Building, Minneapolis 55401
Cincinnati, Ohio--Glen A. Fierst, 550 Main Street, Federal Office Building - Room 1010, Cincinnati 45202
Cleveland, Ohio--Robert F. Pietrykowski, 1240 E. 9th Street - Room 817, Federal Office Building, Cleveland 44199
Columbus, Ohio--Karl A. Jemison, 700 Bryden Road, 213 Bryson Building, Columbus 43215
Madison, Wis.--Jerome H. Estock, 303 Price Place, Room 114, Lincoln Building, Madison 53705
Milwaukee, Wis.--Edmund Shedd, 741 N. Milwaukee Street, 535 Grain Exchange Building, Milwaukee 53202

Dallas Region

Little Rock, Ark.--Bill D. Guse, Room 3527 Federal Office Building, 700 West Capitol Avenue, Little Rock 72201
Baton Rouge, La.--Donald E. Zimpfer, Room 216-B, Hoover Building, 8312 Florida Boulevard, Baton Rouge 70806
New Orleans, La.--Thomas B. Killeen, Room 632, Federal Building, 600 South Street, New Orleans 70130
Albuquerque, N.M.--Willie G. Thurman, P.O. Box 1869, Albuquerque 87103
Oklahoma City, Okla.--Shirley C. Thorne, Room 210, Post Office Building, 3rd and Robinson Streets, Oklahoma City 73102
Tulsa, Okla.--Bill M. Hamilton, Room 3014, Federal Building, 333 West Fourth Street, Tulsa 74103
Dallas, Tex.--Edgar M. Wiemar, Room 1A3, Federal Building, 1100 Commerce Street, Dallas 75202
El Paso, Tex.--William C. Calvit, Suite 1103, Mills Building, 303 North Oregon Street, El Paso 79901
Fort Worth, Tex.--L. C. Chandler, 819 Taylor Street - Room 7A12, Fort Worth 76102
Harlingen, Tex.--Alfred A. Ramsey, P.O. Box 1147, Harlingen 78550
Houston, Tex. - East--Karle G. Berg, 2320 LaBranch, Room 2103, Houston 77004
Houston, Tex. - West--William H. Lemons, Jr., 2320 LaBranch Street - Room 2101, Houston 77004
San Antonio, Tex.--Harry B. Nunn, Jr., 403 Kallison Building, 434 South Main Avenue, San Antonio 78204
Waco, Tex.--Ben W. Ferrell, 621 Citizen's Tower, Fifth and Franklin Streets, Waco 76701

Denver Region

Denver, Colo.--Wilbur J. Olson, 228 U.S. Custom House, 721-19th Street, Denver 80202
Salt Lake City, Utah--Area Director, 3207 Federal Building,125 South State Street, Salt Lake City 84138

Kansas City Region

Des Moines, Iowa--Paul A. Lynn, 638 Federal Building, 210 Walnut Street, Des Moines 50309
Wichita, Kans.--Walter S. Gick, 411 Beacon Building, 114 South Main, Wichita 67202
Kansas City, Kans.--Rex L. Wayman, 241 U.S. Courthouse, 811 Grand Avenue, Kansas City 64106
St. Louis, Mo.--Jack R. Younce, 210 North 12th Boulevard - Room 563, St. Louis 63101
Omaha, Nebraska--Floyd L. Wilson, 2118 Federal Building, 215 North 17th Street, Omaha 68102

New York Region

Newark, N.J.--Area Director, 870 Broad Street - Room 836, Newark 07102
Paterson, N.J.--Leonard R. Jacoby, 133 Ellison Street, Paterson 07505
Trenton, N.J.--Area Director, 143 East State Street, Trenton 08608
Albany, N.Y.--Julius R. Chenu, 41 State Street, Albany 12207
Brooklyn, N.Y.--Joseph Shaffer, 271 Cadman Plaza East - Room 631, Brooklyn 11201
Bronx, N.Y.--Abraham Klainbard, 881 Gerard Avenue - Room 4, Bronx 10452

Buffalo, N.Y.-- Edward J. McNamara, 617 Federal Building, 111 West Huron Street, Buffalo 14202
Hempstead Long Island, N.Y.--Joseph F. Gorga, Street Floor, 159 North Franklin Street, Hempstead 11550
New York, N.Y.--Area Director, 26 Federal Plaza - Room 2946, New York 10007
Hato Rey, Puerto Rico--Pedro Montes-Herdandez, Pan Am Building - Suite 310 255 Ponce de Leon Avenue, Hato Rey 00917
Mayaguez, Puerto Rico--Eddie Bonar-Antonetti, Americo Marin Building, 105 East Mendez Vigo Street, Mayaguez 00708

Philadelphia Region

Baltimore, Md.--Hillard Curland, 1022 Federal Office Building, 31 Hopkins Plaza, Charles Center, Baltimore 21201
Hyattsville, Md.--Area Director, Suite 904 Presidential Building, 6525 Belcrest Road, Hyattsville 20782
Harrisburg, Pa.--David Feinberg, Federal Building - Room 74, 228 Walnut Street, Box 1005, Harrisburg 17108
McKeesport, Pa.--Area Director, 224 Fifth Avenue, Room 205, McKeesport 15132
Philadelphia, Pa.--Theodore M. Rogers, 600 Arch Street - Room 4244, Philadelphia 19106
Pittsburgh, Pa.--Area Director, 702 Federal Building, 1000 Liberty Avenue, Pittsburgh 15222
Wilkes-Barre, Pa.--Jack R. Elliott, 602 Wyoming Valley, Veterans Building, 19 North Main Street, Wilkes-Barre 18701

Richmond, Va.--Robert F. Ferguson, Jr., 7000 Federal Building, 400 North 8th Street, Richmond 23240
Roanoke, Va.--David E. Pickard, 609-13 Peoples Federal Building, 101 S. Jefferson Street, Roanoke 24011
Charleston, W.Va.--Eldon F. Spurlock, 22 Capitol Street, Charleston 25301

San Francisco Region

Phoenix, Ariz.--John Breen, Park Plaza Building, 1306 North 1st Street, Phoenix 85004
Hollywood, Calif.--Robert C. Sturgis, Room 504, 6777 Hollywood Boulevard, Hollywood 90028
Los Angeles, Calif.--Carl M. Oelrich, 7717 Federal Building, 300 North Los Angeles Street, Los Angeles 90012
Sacramento, Calif.--John F. Cooper, 8410 Federal Building and U.S. Courthouse, 650 Capitol Mall, Sacramento 95814
San Francisco, Calif.--Patricia H. Mills, 409 Phelan Building, 760 Market Street, San Francisco 94102
Whittier, Calif.--Theodore Revak, Main Floor, 7238 South Painter Avenue, P. O. Box 81, Whittier 90602
Honolulu, Hawaii--Thomas N. Moriki, 1833 Kalakaua Avenue - Room 614, Honolulu 96815

Seattle Region

Portland, Oreg.--Donald W. Henry, 528 Pittock Block, 921 S.W. Washington Street, Portland 97205
Seattle, Wash.--Eugene T. Kord, Room 1821 Smith Tower, 506 Second Avenue, Seattle 98104

Defendant's Exhibit No. 4

NATIONAL LEAGUE OF CITIES
UNITED STATES CONFERENCE OF MAYORS
July 5, 1974

Warren D. Landis, Administrator
Wage and Hour Division
Department of Labor
711 14th Street, N.W.
Room 1107
Washington, D.C. 20210

Dear Warren:

Attached, as promised, are the results of the survey of cities over 10,000 population relative to "tours of duty" and fire department "work cycles."

It is our hope that you will find the information useful, relevant and helpful to you and your staff in the development of regulations for public safety employees.

If you have any questions, or if we can be of further assistance, please call.

Sincerely,

/s/ Don
Donald A. Slater
Director
Office of Federal Relations

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Attached for your information are the results of the ICMA survey discussed by Chief Mitchell in his testimony on behalf of the National League of Cities, U.S. Conference of Mayors, International City Management Association, National Governors Conference and National Association of Counties before the Department of Labor on the development of regulations for implementation of the Fair Labor Standards Act Amendments of 1974 relating to public safety personnel.

All cities in the United States over 10,000 population were surveyed to determine fire "tours of duty" and fire department "work cycle" practices.

A key finding in the survey is that 80% of American municipal fire departments use a "tour of duty" which is 24 hours in length. Only 18% use a "split-shift" such as 10/14 (10 hour day shift; 14 hour night shift), 9/15 (9 hour day shift; 15 hour night shift), or the 11/13 (11 hour day shift; 13 hour night shift). Two percent of municipal fire departments use eight hour work shifts or other shift arrangements.

The prevailing practice among fire departments in the United States (except in a few states such as New Jersey and Pennsylvania) is to use the 24 hour duty period for firefighters assigned to fire suppression.

The Department of Labor decision as to whether to exempt or not exempt time spent in eating and sleeping thus has great importance in over a thousand American cities. The decision will affect fire department operations, costs of fire service and levels of fire service in a great many cities. The Department of Labor May 14 interim ruling, which requires that for firefighters with tours of duty of 24 hours or less no time may be deducted for meals or sleeping, reverses the historic practice of exempting meal and sleeping time for just this one group

of employees. Eating and sleeping time has been deducted for industrial firefighters assigned to a 24 hour tour of duty, as well as other employees in both the private and public sector assigned to 24 hour tours of duty. Equity requires that the ruling promulgated in the interim regulation be reversed and that the traditional and longstanding Wage and Hour ruling on 24 hour tours of duty be continued across the board to all employees who work such shifts.

Another key finding of the survey is that a majority of municipal fire departments have "work cycles" which are less than 7 days in length or greater than 28 days in length. Forty-one percent of municipal fire departments have "work cycles" which are two, three, four, five or six days in length. Nine and one-half percent of municipal fire departments report cycles ranging from 29 days to a year in length. These findings contradict testimony in the June 3 hearing that very few cities have "work cycles" in excess of 28 days. A further finding is that over one-third of fire department use a 24 hour on/48 hour off duty cycle. This averages 56 hours per week; the cycle is three days in length. Detailed information concerning the great variety of lengths of duty cycles is reported in the attached survey.

To accomodate to the new requirements imposed by Section 7 (k) of the Act, municipalities must have the discretion to determine the length of the "work period" at any point between 7 days and 28 days. Notwithstanding statements presented at the hearings, we submit that nowhere in the legislation or legislative intent can be found any support for the contention that the "work cycle" be the shortest number of days within the 7 to 28 day period within which the fire duty schedule is established without repeating itself.

While the question was not asked in the survey, many cities reported the use of "paybacks" and "Kelly days." The use of "paybacks" and "Kelly days" has the effect of lengthening the work cycle – often to as much as a year. A brief definition of these terms is: A *"payback"* is a tour of duty which the firefighter owes the city. It is a scheduled tour of duty within the calendar year but is paid back on occasions outside the regular work cycle. E.g. assume a fire department which as a 60 hour average fire duty week; the work cycle is 9 days in length. A fireman is scheduled to be on duty three 24-hour periods in the cycle as follows: (XOXOXOOO). On this work cycle a fireman would have a 56-hour average duty week. However, he is required during the year to "pay back" eight 24-hour duty periods. Each fire duty period paid back has the effect of one-half average hour per week. Therefore, the 8 fire duty periods served raises the average of the fire duty week over the course of a year to 60 hours. The use of "paybacks" is very common among many fire departments because of the several advantages to both firefighters and fire management in this kind of scheduling arrangement. The fire department can thus establish a three platoon system, and at the same time have the use of payback time for filling in for scheduled vacations or unscheduled absences such as sick leave relief.

The "Kelly Day" is the reverse of the payback in fire department scheduling of tours of duty. In the 1930's, Chicago firemen were on duty for 24 hours, then off duty 24 hours (equivalent to an average 84 hour week). Legend says that Mayor Kelly, then Mayor of Chicago, reduced Chicago fire hours by providing that every eighth scheduled 24-hour duty period would be taken off.

Thereupon, the Chicago fire duty cycle was changed from 2 days in length (XO) to a schedule of 16 days in length (XOXOXOXOXOXOXO*O). The formerly scheduled 24-hour period not worked was thus nicknamed the "Kelly Day" in recognition and appreciation of Mayor Kelly's action.

During the past thirty-plus years, the term "Kelly Day" has spread to many other cities and has more recently acquired a meaning somewhat parallel to that of "payback", except that the fireman will not serve one or more schedule shifts during the year, rather than to have to pay them back. For example, again assume that the fire department has a 9-day cycle, with 3 scheduled 24-hour periods on duty every 9 days (XOXOXOOOO). Now assume that each firefighter has 8 "Kelly Days" throughout the year. This means that instead of being scheduled to be on duty 121 times per year, a firefighter would actually be scheduled to be on duty only 113 (121-8) times per year. Thus, instead of an average 56-hour average duty week, in this example the firefighter would have an average 52-hour week. The "work cycle", in this example, would be extended from 9 days to possibly as long as an entire year. The administrative advantages of the Kelly Day are similar to the payback. The fire department can retain a basic platoon arrangement and permit "Kelly Days" off either on a regular recurring cycle, or perhaps on an irregular basis at times when the fire department can better afford to have fewer firefighters on duty.

Many cities surveyed volunteered the information that their particular departments use a "payback" or a "Kelly Day", on either a regular basis or an irregular basis. Since

*Kelly Day

the specific question was not asked on the survey questionnaire, it is not possible to report exact information as to how fire departments use one or the other of these scheduling methods. It is probable that as many as 20% of the municipal fire departments may use some variation of "payback" or "Kelly Day" scheduling. Therefore, the more likely percentage of fire departments having work cycles of other than between 7 and 28 days, rather than 50.5% is in excess of 60%.

With the requirement of the law being that the work period must be between 7 and 28 days, many fire departments throughout the United States will need to re-structure the fire duty schedule thus eliminating the present, and long-prevailing, practice of using "paybacks" and "Kelly Days."

Since there was no discussion at the hearing of the problems of paybacks and Kelly Days, these definitions and examples are presented to alert the Department of Labor to yet another complexity in dealing with fire duty schedules.

After the fire duty schedules had been returned and were being tabulated and analyzed, another pattern began to emerge from comments volunteered by respondents. In a number of states, laws have been enacted which regulate various aspects of fire hours, such as the length of the tour of duty, the length of the work cycle, or to specify the maximum average number of hours per week. Therefore, a special survey was prepared by the National League of Cities and sent to each State Municipal League, asking whether the individual state had legislation enacted which restricted or affected fire duty hours. Of 36 states which have replied to date, 18 have reported that there is current legislation in force within the state which restricts fire hours or scheduling. Many Leagues

attached copies of state statutes. As many of these statutes contain provisions which are contrary to the provisions of the Amendments to the Fair Labor Standards Act, copies of these statutes are included as attachments to this letter.

The regulation to be issued by the Department of Labor must specifically nullify any existing state statute which mandates less than a 7 day "work cycle" or more than a 28 day "work cycle". Cities must not be caught on the horns of a dilemma of complying with a state statute which will in turn cause unnecessary mandatory overtime

We especially would like to call to your attention the Texas statute, which requires cities to average fire duty hours over the course of an entire year. The Maine statute requires the work cycle to be not longer than 12 weeks. North and South Dakota each restrict the fire duty cycle to 2 weeks. For certain cities, New Jersey requires a 6-week fire duty cycle. Kentucky limits cities to 24-hours on-duty, 48-hours off-duty: a three day cycle. Michigan requires municipal fire departments to use a 24-hour fire duty period, with at least 24-hours off duty following an on duty period. On the other hand, New Jersey and Pennsylvania require a 10/14 system (10 hour day shift 8 a.m. to 6 p.m.; 14 hour night shift 6 p.m. to 8 a.m.). Montana has a law which appears to limit the work-related hours of a 24-hour fire duty period to a maximum of 8 hours, except for fire or emergency responses. A telephone call to Montana to identify more specifically the meaning of this statute produced the information that there are four cities of the first class and that each such city uses a 24-hour duty period. Therefore, this law seems to emphasize the difference between the traditional fire duty period in which up to a

third of the 24 hours are spent in active work-related activities, and at least two thirds of the 24-hour period is spent in sleeping, eating and other standby activities, but during which the firefighter is always subject to call to respond to alarms.

In addition to the supplemental attachment of the survey of state statutes, the final attachment is a computer printout of information for almost all cities participating in the survey. For technical reasons, as information was introduced into the computer on two occasions, we are informed that the computer run will not print individual data for 85 cities. Therefore, the array of data is not totally complete.

ICMA Survey on Firefighter Schedules

The recently passed Fair Labor Standards Act will have major implications for local government in the areas of police and fire. The Department of Labor is in the process of developing regulations which will determine how this law will be administered. They will be holding hearings on these regulations shortly. It is imperative that they receive local input to guide them.

By filling our the questionnaire below you will be giving us necessary information to make positive recommendations. Time is limited. Hearings begin on *June 3.* Please fill out the questionnaire and return it in the enclosed business reply envelope *immediately*.

* * *

1. Does your municipality have a full-time paid uniformed fire department (excluding departments with only a paid fire chief and the remainder volunteer)?

YES ( ) NO ( )

If "NO", please indicate which of the following is applicable to your municipality. (Check one)

_____ a. Volunteer fire department
_____ b. Contract for fire service
_____ c. Fire service provided by a special district
_____ d. Metropolitan government provides service
_____ e. Public Safety Department
_____ f. County provides service

2. DUTY SHIFT: Please indicate the length of the duty shift for personnel engaged in *actual* firefighting or suppression. (Check one)

_____ a. 24-hour continuous shift (includes sleeping and eating time)
_____ b. 10/14 shift (10 hour daytime, 14 hour nighttime shifts, e.g. a typical 10 hour shift would be 8 am to 6 pm and 14 hour shift; 6 pm to 8 am)
_____ c. 9/15 shift (9 hour daytime, 15 hour nighttime shifts)
_____ d. 8 hour work day (firefighters are on the job during the shift, not just on call)
_____ e. Other (Please explain)_____

_____

3. DUTY CYCLE: Work schedules are computed on the basis of a duty cycle of a certain number of days on and off. The cycle is not necessarily a week. For instance, it might be one day on duty, two days off duty and then repeating; this would be a three day work cycle. Cycles may range from 2 days to 28 days or longer.

Please indicate the length of your firefighters' duty cycle _____
(# of days)

Please indicate the number of days on duty during cycle _____
(# of days on duty)

4. HOURS ON DUTY PER WEEK: When averaged over the year, how many hours per week (7 days) are your firefighters on duty? _____ hours.

Name_____
Position _____
City _____
State _____

TABLE 1

CITIES OVER 10,000 POPULATION IN THE UNITED STATES
RESPONDING TO SURVEY OF MUNICIPAL FIREFIGHTERS

Population Group	No. of cities surveyed (A)	No.	% of (A)
Total, all cities....	2,290	1,637	72
Over 500,000	26	21	81
250,000 - 499,999 ...	30	23	77
100,000 - 249,999 ...	98	78	80
50,000 - 99,999 ...	256	193	75
25,000 - 49,999 ...	520	395	76
10,000 - 24,999 ...	1,360	927	68

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Table 2

CITIES OVER 10,000 IN THE UNITED STATES
HAVING FULL TIME PAID UNIFORMED FIREFIGHTERS

Population Group	No. of cities reporting (A)	Cities having full-time paid uniformed fire department: TOTAL No. (B)	TOTAL % of (A)	FF 5 & over No. (B)	FF 5 & over % of (B)	FF 4 & under No. (B)	FF 4 & under % of (B)	Size unknown No. (B)	Size unknown % of (B)	Cities not having full-time paid uniformed fire department: Total No. (C)	Total % of (A)	FF 5 & over No. (C)	FF 5 & over % of (C)	FF 4 & under No. (C)	FF 4 & under % of (C)	Size unknown No. (C)	Size unknown % of (C)
Total, all cities ...	1,637	1,270	78	966	76	8	1	296	23	367	22	24	7	28	8	315	86
Over 500,000	21	21	100	16	76	0	.	5	24	0	...	..	.	..	.	...	..
250,000 - 499,999 ...	23	23	100	22	96	0	.	1	4	0	..	..	.	..	.	...	..
100,000 - 249,999 ...	78	78	100	68	87	0	.	10	13	0	..	..	.	..	.	...	..
50,000 - 99,999 ...	193	175	91	136	78	0	.	39	22	18	9	2	11	0	.	16	89
25,000 - 49,999 ...	395	336	85	267	79	2	0	67	20	59	15	3	5	3	5	53	90
),000 - 24,999 ...	927	637	69	457	72	6	1	174	27	290	31	19	7	25	9	246	85

Table 3

TOURS OF DUTY FOR FIREFIGHTERS IN CITIES OVER 10,000

ulation Group	# of Cities Reporting (A)	24 Hour Continuous Shift No.	% of (A)	10/14 Shift No.	% of (A)	9/15 Shift No.	% of (A)	11/13 Shift No.	% of (A)	8 Hour Workday No.	% of (A)	Other No.	% of (A)
Total, all cities	1,296	1,012	80	207	16	6	1	6	1	24	2	14	1
Over 500,000	21	13	62	7	33	1	5	0	0	0	0	0	0
250,000 - 499,999	22	18	82	3	14	0	0	1	4	0	0	0	0
100,000 - 249,000	78	62	79	16	21	0	0	0	0	0	0	0	0
50,000 - 99,999	175	127	73	45	26	0	0	0	0	2	1	1	.↓.
25,000 - 49,999	356	270	80	53	16	1	.↓.	3	1	5	2	4	1
[illegible] - 24,999	637	522	82	83	13	4	1	2	.↓.	17	3	9	1

.↓. Less than .5%

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Table 3(a)

MUNICIPALITIES HAVING 24-HOUR CONTINUOUS DUTY SHIFT FOR FIREFIGHTERS

Population Group	No. of cities reporting (A)	FF 5&over No.	% of ( )	FF 4&under No.	%of ( )	Size unknown No.	%of ( )
Total, all cities...	1,012	804	79	7	1	201	20
Over 500,000.....	13	10	77	0	..	3	23
250,000 - 499,999...	18	18	100	0	..	0	..
100,000 - 249,999...	62	57	92	0	..	5	8
50,000 - 99,999...	127	107	84	0	..	20	16
25,000 - 49,999...	270	225	83	2	1	43	16
10 00 - 24,999...	522	387	74	5	1	130	25

↓ LESS THAN 5%

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Table 3(b)

MUNICIPALITIES HAVING A 10/14 DUTY SHIFT FOR FIREFIGHTERS

Population Group	No. of cities reporting (A)	FF 5& over No.	% of (A)	FF 4 & under No.	% of (A)	Size unknown No.	% of (A)
Total, all cities...	207	136	66	0	..	71	34
Over 500,000.....	7	6	86	0	..	1	14
250,000 - 249,999...	3	2	67	0	..	1	33
100,000 - 249,999...	16	12	75	0	..	4	25
50,000 - 99,999 ...	45	26	58	0	..	19	42
25,000 - 49,999....	53	37	70	0	..	16	30
1)00 - 24,999...	83	53	64	0	..	30	36

Table 3(c)

MUNICIPALITIES HAVING A 9/15 DUTY SHIFT FOR FIREFIGHTERS

opulation Group	No. of cities reporting (A)	FF 5 and over No.	% of (A)	FF 4 and under No.	% of (A)	Size unknown No.	% of (A)
otal, all cities...	6	4	67	0	...	2	33
ver 500,000	1	1	100	0	...	0	...
50,000 - 499,999 ..	0	...	...	...	...	...	...
00,000 - 249,999 ..	0	...	...	...	...	...	...
50,000 - 99,999 ..	0	...	...	...	...	...	...
25,000 - 49,999 ..	1	1	100	0	...	0	...
10,000 - 24,999 ...	4	2	50	0	...	2	50

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Table 3(d)

MUNICIPALITIES HAVING AN 11/13 DUTY SHIFT FOR FIREFIGHTERS

Population Group	No. of cities reporting (A)	FF 5 and over No.	FF 5 and over % of (A)	FF 4 and under No.	FF 4 and under % of (A)	Size unknown No.	Size unknown % of (A)
Total, all cities....	6	4	67	0	..	2	33
Over 500,000.....	0	..	..	..	..	..	..
250,000 - 499,999....	1	1	100	0	..	0	..
100,000 - 249,999....	0	..	..	..	..	..	..
50,000 - 99,999.....	0	..	..	..	..	..	..
25,000 - 49,999.....	3	3	100	0	..	0	..
,000 -24,999.....	2	3	..	0	..	0	100

Table 3(e)

MUNICIPALITIES HAVING AN 8-HOUR WORK DAY FOR FIREFIGHTERS

Population Group	No. of cities reporting (A)	FF 5 and over No.	FF 5 and over % of (A)	FF 4 and under No.	FF 4 and under % of (A)	Size unknown No.	Size unknown % of (A)
Total, all cities...	24	11	46	0	..	13	54
Over 500,000.....	0	..	..	..	..	..	..
250,000 - 499,999...	0	..	..	..	..	..	..
100,000 - 249,999...	0	..	..	..	..	..	..
50,000 - 99,999....	2	2	100	0	..	0	..
25,000 - 49,999....	5	3	60	0	..	2	40
10,000 - 24,999....	17	6	35	0	..	11	65

Table 3(f)

MUNICIPALITIES HAVING "OTHER" DUTY SHIFTS FOR FIREFIGHTERS

Population Group	No. of cities reporting (A)	FF 5 and over No.	FF 5 and over % of (A)	FF 4 and under No.	FF 4 and under % of (A)	Size unknown No.	Size unknown % of (A)
Total, all cities...	14	8	57	0	..	6	43
Over 500,000.....	0	..	..	..	..	..	..
250,000 - 499,999...	0	..	..	..	..	..	..
100,000 -249,999....	0	..	..	..	..	..	..
50,000 - 99,999....	1	1	100	0	..	0	..
25,000 - 49,999....	4	2	50	0	..	2	50
10,000 - 24,999....	9	5	55	0	..	4	45

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Table 4

LENGTH OF FIREFIGHTERS DUTY CYCLE (IN DAYS)

		2								3							
Population Group	No. of cities reporting (A)	Total No. (B)	Total % of (A)	FF 5&over No. (B)	FF 5&over % of (B)	FF 4 & Under No. (B)	FF 4 & Under % of (B)	Size unknown No. (B)	Size unknown % of (B)	Total No. (C)	Total % of (A)	FF 5&over No. (C)	FF 5&over % of (C)	FF 4&under No. (C)	FF 4&under % of (C)	Size unknown No. (C)	Size unknown % of (C)
Total, all cities.....	1,209	12	1	9	75	0	..	3	25	438	36	338	77	5	1	95	22
Over 500,000.....	21	0	..	..	..	..	..	..	..	6	29	5	83	0	..	1	17
250,000 -499,999.....	22	0	..	..	..	..	..	..	..	11	50	11	100	0	..	0	..
100,000 - 249,999.....	78	0	..	..	..	..	..	..	..	22	28	20	91	0	..	2	9
50,000 - 99,999	165	0	..	..	..	..	..	..	..	48	29	40	83	0	..	8	17
25,000 - 49,999.....	321	1	..	1	100	0	..	0	..	116	36	100	86	3	3	13	11
10,000 - 24,999.....	602	11	2	8	73	0	..	3	27	235	39	162	69	2	1	71	30

.. less than .5%

Table 4 (cont'd.)

LENGTH OF FIREFIGHTERS DUTY CYCLE (in days) cont'd.

Population Group	No. of cities reporting (A)	4 Total No. (D)	4 Total % of (A)	4 FF 5& over No. (D)	4 FF 5& over % of (D)	4 FF 4 & Under No. (D)	4 FF 4 & Under % of (D)	4 Size unknown No. (D)	4 Size unknown % of (D)	5 Total No. (E)	5 Total % of (A)	5 FF 5& over No. (E)	5 FF 5& over % of (E)	5 FF 4& under No. (E)	5 FF 4& under % of (E)	5 Size unknown No. (E)	5 Size unknown % of (E)
Total, all cities....	1,209	17	1	11	65	0	..	6	35	1	↓	1	100	0	..	0	..
Over 500,000.....	21	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
500,000 - 499,999.....	22	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
100,000 - 249,999.....	78	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
50,000 - 99,999.....	165	4	2	2	50	0	..	2	50	0	..	..	..	..	..	..	..
25,000 - 49,999.....	321	4	1	2	50	0	..	2	50	0	..	..	..	..	..	..	..
10,000 - 24,999.....	602	9	2	7	78	0	..	2	22	1	↓	1	..	0	..	0	..

↓ less than .5%

Table 4 (cont'd.)

LENGTH OF FIREFIGHTERS DUTY CYCLE (in days) cont'd.

Population Group	No. of cities reporting (A)	6 Total No. (F)	6 Total % of (A)	6 FF 5& over No. (F)	6 FF 5& over % of (F)	6 FF 4 & Under No. (F)	6 FF 4 & Under % of (F)	6 Size unknown No. (F)	6 Size unknown % of (F)	7 Total No. (G)	7 Total % of (A)	7 FF 5& over No. (G)	7 FF 5& over % of (G)	7 FF 4& under No. (G)	7 FF 4& under % of (G)	7 Size unknown No. (G)	7 Size unknown % of (G)
Total, all cities....	1,209	28	2	23	82	0	..	5	18	44	4	30	68	0	..	14	32
Over 500,000.....	21	1	5	1	100	0	..	0	..	0	..	..	..	..	..	..	..
500,000 - 499,999.....	22	1	5	1	100	0	..	0	..	0	..	..	..	..	..	..	..
100,000 - 249,999.....	78	2	3	2	100	0	..	0	..	0	..	..	..	..	..	..	..
50,000 - 99,999.....	165	3	2	3	100	0	..	0	..	4	2	4	100	0	..	0	..
25,000 - 49,999.....	321	8	3	7	88	0	..	1	13	9	3	6	67	0	..	3	23
10,000 - 24,999.....	602	13	2	9	69	0	..	4	31	31	5	20	65	0	..	11	35

Table 4 cont'd.

LENGTH OF FIREFIGHTERS DUTY CYCLE (in days) cont'd.

Population Group	No. of cities reporting (A)	8 Total No. (H)	8 Total % of (A)	8 FF 5&over No. (H)	8 FF 5&over % of (H)	8 FF 4 &Under No. (H)	8 FF 4 &Under % of (H)	8 Size unknown No. (H)	8 Size unknown % of (H)	9 Total No. (I)	9 Total % of (A)	9 FF 5&over No. (I)	9 FF 5&over % of (I)	9 FF 4&under No. (I)	9 FF 4&under % of (I)	9 Size unknown No. (I)	9 Size unknown % of (I)
Total, all cities....	1,209	118	10	89	75	2	2	27	23	182	15	148	81	1	1	33	18
Over 500,000.....	21	2	10	1	50	0	..	1	50	3	14	2	67	0	..	1	33
,000 - 499,999....	22	1	5	1	100	0	..	0	..	2	9	2	100	0	..	0	..
100,000 - 249,999....	78	6	8	6	100	0	..	0	..	18	23	16	89	0	..	2	11
50,000 - 99,999.....	165	14	8	6	43	0	..	8	57	38	23	34	89	0	..	4	11
25,000 - 49,999.....	321	35	11	29	83	0	..	6	17	58	18	51	88	0	..	7	12
10,000 - 24,999.....	602	60	10	46	77	2	3	12	20	63	11	43	68	1	2	19	30

Table 4 cont'd.

LENGTH OF FIREFIGHTERS DUTY CYCLE (in days) cont'd.

Population Group	No. of cities reporting (A)	10 Total No. (J)	10 Total % of (A)	10 FF 5&over No. (J)	10 FF 5&over % of (J)	10 FF 4 &Under No. (J)	10 FF 4 &Under % of (J)	10 Size unknown No. (J)	10 Size unknown % of (J)	11 Total No. (K)	11 Total % of (A)	11 FF 5&over No. (k)	11 FF 5&over % of (k)	11 FF 4&under No. (K)	11 FF 4&under % of (K)	11 Size unknown No. (K)	11 Size unknown % of (K)
Total, all cities....	1,209	21	2	20	95	0	..	1	5	4	↓ ..	3	75	0	..	1	25
Over 500,000.....	21	0	..	..	..	..	..	..	..	1	5	1	100	0	..	0	..
,000 - 499,999.....	22	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
100,000 - 249,999.....	78	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
50,000 - 99,999.....	165	3	2	3	100	0	..	0	..	0	..	..	..	..	..	..	..
25,000 - 49,999.....	321	4	1	4	100	0	..	0	..	1	↓ ..	0	..	0	..	1	100
10,000 - 24,999.....	602	14	2	13	93	0	..	1	7	2	↓ ..	2	100	0	..	0	..

↓ .5% (less than .5%)

Table 4 cont'd.

LENGTH OF FIREFIGHTERS DUTY CYCLE (in days) cont'd.

Population Group	No. of cities reporting (A)	12 Total No. (L)	12 Total % of (A)	12 FF 5&over No. (L)	12 FF 5&over % of (L)	12 FF 4 &Under No. (L)	12 FF 4 &Under % of (L)	12 Size unknown No. (L)	12 Size unknown % of (L)	14 Total No. (M)	14 Total % of (A)	14 FF 5&over No. (M)	14 FF 5&over % of (M)	14 FF 4&under No. (M)	14 FF 4&under % of (M)	14 Size unknown No. (M)	14 Size unknown % of (M)
Total, all cities....	1,209	56	5	40	71	0	..	16	29	27	2	22	81	0	..	5	19
Over 500,000.....	21	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
250,000 - 499,999.....	22	2	9	1	50	0	..	1	50	0	..	..	..	..	..	..	..
100,000 - 249,999.....	78	4	5	3	75	0	..	1	25	2	3	2	100	0	..	0	..
50,000 - 99,999.....	165	14	9	9	64	0	..	5	36	2	1	1	50	0	..	1	50
25,000 - 49,999.....	321	14	4	9	64	0	..	5	36	6	2	6	100	0	..	0	..
10,000 - 24,999.....	602	22	4	18	82	0	..	4	18	17	3	13	76	0	..	4	24

Table 4 cont'd.

LENGTH OF FIREFIGHTERS DUTY CYCLE (in days) cont'd.

Population Group	No. of cities reporting (A)	15 Total No. (N)	15 Total % of (A)	15 FF 5&over No. (N)	15 FF 5&over % of (N)	15 FF 4 &Under No. (N)	15 FF 4 &Under % of (N)	15 Size unknown No. (N)	15 Size unknown % of (N)	16 Total No. (O)	16 Total % of (A)	16 FF 5&over No. (O)	16 FF 5&over % of (O)	16 FF 4&under No. (O)	16 FF 4&under % of (O)	16 Size unknown No. (O)	16 Size unknown % of (O)
Total, all cities....	1,209	14	1	12	86	0	..	2	14	11	1	8	73	0	..	3	27
Over 500,000.....	21	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
250,000 - 499,999.....	22	1	5	1	100	0	..	0	..	0	..	..	..	..	..	..	..
100,000 - 249,999.....	78	2	3	2	100	0	..	0	..	0	..	..	..	..	..	..	..
50,000 - 99,999.....	165	2	1	2	100	0	..	0	..	0	..	..	..	..	..	..	..
25,000 - 49,999.....	321	5	2	5	100	0	..	0	..	1	↘	0	..	0	..	1	100
10,000 - 24,999.....	602	4	1	2	50	0	..	2	50	10	2	8	80	0	..	2	20

↘. less than 5%

Table 4 cont'd.

LENGTH OF FIREFIGHTERS DUTY CYCLE (in days) cont'd.

Population Group	No. of cities reporting (A)	17 Total No. (P)	17 Total % of (A)	17 FF 5& over No. (P)	17 FF 5& over % of	17 FF 4 & Under No. (P)	17 FF 4 & Under % of	17 Size unknown No. (P)	17 Size unknown % of	18 Total No. (Q)	18 Total % of (A)	18 FF 5& over No. (Q)	18 FF 5& over % of	18 FF 4& under No. (Q)	18 FF 4& under % of	18 Size unknown No. (Q)	18 Size unknown % of
Total, all cities....	1,209	1	↓	0	..	0	..	1	100	4	↓	4	100	0	..	0	..
Over 500,000.....	21	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
10,000 - 499,999.....	22	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
100,000 - 249,999.....	78	1	1	0	..	0	..	1	100	0	..	..	..	..	..	..	..
50,000 - 99,999.....	165	0	..	..	..	..	..	..	..	1	1	1	100	0	..	0	..
25,000 - 49,999.....	321	0	..	..	..	..	..	..	..	1	↓	1	100	0	..	0	..
10,000 - 24,999.....	602	0	..	..	..	..	..	..	..	2	↓	2	100	0	..	0	..

↓ less than .5%

Table 4 cont'd.

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LENGTH OF FIREFIGHTERS DUTY CYCLE (in days) cont'd.

Population Group	No. of cities reporting (A)	20 Total No. (R)	20 Total % of (A)	20 FF 5& over No. (R)	20 FF 5& over % of	20 FF 4 & Under No. (R)	20 FF 4 & Under % of	20 Size unknown No. (R)	20 Size unknown % of	21 Total No. (S)	21 Total % of (A)	21 FF 5& over No. (S)	21 FF 5& over % of	21 FF 4& under No. (S)	21 FF 4& under % of	21 Size unknown No. (S)	21 Size unknown % of
Total, all cities....	1,209	2	↓	2	100	0	..	0	..	27	2	16	59	1	4	10	37
Over 500,000.....	21	0	..	..	..	..	..	..	..	1	5	0	..	0	..	1	100
10,000 - 499,999.....	22	0	..	..	..	..	..	..	..	1	5	1	100	0	..	0	..
100,000 - 249,999.....	78	0	..	..	..	..	..	..	..	3	4	1	33	0	..	2	67
50,000 - 99,999.....	165	0	..	..	..	..	..	..	..	4	2	4	100	0	..	0	..
25,000 - 49,999.....	321	0	..	..	..	..	..	..	..	8	2	5	62	0	..	3	38
10,000 - 24,999.....	602	2	↓	2	100	0	..	0	..	10	2	5	50	1	10	4	40

↓ less than .5%

Table 4 cont'd.

LENGTH OF FIREFIGHTERS DUTY CYCLE (in days) cont'd

Population Group	No. of cities reporting (A)	22 Total No. (T)	22 Total % of (A)	22 FF 5&over No. (T)	22 FF 5&over % of (T)	22 FF 4&Under No. (T)	22 FF 4&Under % of (T)	22 Size unknown No. (T)	22 Size unknown % of (T)	24 Total No. (U)	24 Total % of (A)	24 FF 5&over No. (U)	24 FF 5&over % of (U)	24 FF 4&under No. (U)	24 FF 4&under % of (U)	24 Size unknown No. (U)	24 Size unknown % of (U)
Total, all cities....	1,209	1	↓	1	100	0	..	0	..	13	1	13	100	0	..	0	..
Over 500,000.....	21	0	..	..	..	..	..	..	..	2	10	2	100	0	..	0	..
0,000 - 499,999....	22	0	..	..	..	..	..	..	..	1	1	1	100	0	..	0	..
100,000 - 249,999....	78	0	..	..	..	..	..	..	..	4	5	4	100	0	..	0	..
50,000 - 99,999.....	165	0	..	..	..	..	..	..	..	1	1	1	100	0	..	0	..
25,000 - 49,999.....	321	0	..	..	..	..	..	..	..	5	2	5	100	0	..	0	..
10,000 - 24,999.....	602	1	↓	1	100	0	..	0	..	0	..	..	..	..	..	..	..

↓ less than .5%

Table 4 cont'd.

LENGTH OF FIREFIGHTERS DUTY CYCLE (in days) cont'd

Population Group	No. of cities reporting (A)	25 Total No. (V)	25 Total % of (A)	25 FF 5&over No. (V)	25 FF 5&over % of (V)	25 FF 4&Under No. (V)	25 FF 4&Under % of (V)	25 Size unknown No. (V)	25 Size unknown % of (V)	26 Total No. (W)	26 Total % of (A)	26 FF 5&over No. (W)	26 FF 5&over % of (W)	26 FF 4&under No. (W)	26 FF 4&under % of (W)	26 Size unknown No. (W)	26 Size unknown % of (W)
Total, all cities....	1,209	1	↓	1	100	0	..	0	..	1	↓	1	100	0	..	0	..
Over 500,000.....	21	1	5	1	100	0	..	0	..	0	....	..	..	..	..	..	..
0,000 - 499,999.....	22	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
100,000 - 249,999.....	78	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
50,000 - 99,999.....	165	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
25,000 - 49,999.....	321	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
10,000 - 24,999.....	602	0	..	..	..	..	..	..	..	1	↓	1	100	0	..	0	..

↓ less than .5%

Table 4 cont'd.

LENGTH OF FIREFIGHTERS DUTY CYCLE (in days) cont'd

Population Group	No. of cities reporting (A)	27 Total No. (X)	27 Total % of (A)	27 FF 5&over No. (X)	27 FF 5&over % of (X)	27 FF 4 &Under No. (X)	27 FF 4 &Under % of (X)	27 Size unknown No. (X)	27 Size unknown % of (X)	28 Total No. (Y)	28 Total % of (A)	28 FF 5&over No. (Y)	28 FF 5&over % of (Y)	28 FF 4&under No. (Y)	28 FF 4&under % of (Y)	28 Size unknown No. (Y)	28 Size unknown % of (Y)
Total, all cities....	1,209	13	1	10	77	0	..	3	23	58	5	44	76	1	2	13	22
Over 500,000.....	21	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
0,000 - 499,999.....	22	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
100,000 - 249,999.....	78	1	1	1	100	0	..	0	..	2	3	2	100	0	..	0	..
50,000 - 99,999.....	165	5	3	4	80	0	..	1	20	6	4	6	100	0	..	0	..
25,000 - 49,999.....	321	3	1	1	33	0	..	2	67	14	4	13	93	0	..	1	7
10,000 - 24,999.....	602	4	1	4	100	0	..	0	..	36	6	23	64	1	3	12	33

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Table 4 cont'd.

LENGTH OF FIREFIGHTERS DUTY CYCLE (in days) cont'd.

Population Group	No. of cities reporting (A)	30 Total No. (Z)	30 Total % of (A)	30 FF 5&over No. (Z)	30 FF 5&over % of (Z)	30 FF 4 &Under No. (Z)	30 FF 4 &Under % of (Z)	30 Size unknown No. (Z)	30 Size unknown % of (Z)	32 Total No. (AA)	32 Total % of (A)	32 FF 5&over No. (AA)	32 FF 5&over % of (AA)	32 FF 4&under No. (AA)	32 FF 4&under % of (AA)	32 Size unknown No. (AA)	32 Size unknown % of (AA)
Total, all cities....	1,209	27	2	25	93	0	..	2	7	9	1	9	100	0	..	0	..
Over 500,000.....	21	1	5	1	100	0	..	0	..	0	..	..	..	..	..	..	..
50,000 - 499,999....	22	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
100,000 - 249,999.....	78	3	4	3	100	0	..	0	..	0	..	..	..	..	..	..	..
50,000 - 99,999.....	165	0	..	..	..	..	..	..		1	1	1	100	0	..	0	..
25,000 - 49,999.....	321	6	2	6	100	0	..	0	..	3	1	3	100	0	..	0	..
10,000 - 24,999.....	602	17	3	15	88	0	..	2	12	5	1	5	100	0	..	0	..

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Table 4 cont'd.

LENGTH OF FIREFIGHTERS DUTY CYCLE (in days) cont'd.

Population Group	No. of cities reporting (A)	33 Total No. (BB)	33 Total % of (A)	33 FF 5&over No. (BB)	33 FF 5&over % of (BB)	33 FF 4 &Under No. (BB)	33 FF 4 &Under % of (BB)	33 Size unknown No. (BB)	33 Size unknown % of (BB)	35 Total No. (CC)	35 Total % of (A)	35 FF 5&over No. (CC)	35 FF 5&over % of (CC)	35 FF 4&under No. (CC)	35 FF 4&under % of (CC)	35 Size unknown No. (CC)	35 Size unknown % of (CC)
Total, all cities....	1,209	1	↓	1	100	0	..	0	..	1	↓	1	100	0	..	0	..
Over 500,000.....	21	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
0,000 - 499,999....	22	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
100,000 - 249,999....	78	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
50,000 - 99,999.....	165	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
25,000 - 49,999.....	321	1	↓	1	100	0	..	0	..	0	..	..	..	..	..	..	..
10,000 - 24,999.....	602	0	..	..	..	..	..	..	..	1	↓	1	100	0	..	0	..

↓ less than .5%

Table 4 cont'd.

LENGTH OF FIREFIGHTERS DUTY CYCLE (in days) cont'd.

Population Group	No. of cities reporting (A)	36 Total No. (DD)	36 Total % of (A)	36 FF 5&over No. (DD)	36 FF 5&over % of (DD)	36 FF 4 &Under No. (DD)	36 FF 4 &Under % of (DD)	36 Size unknown No. (DD)	36 Size unknown % of (DD)	40 Total No. (EE)	40 Total % of (A)	40 FF 5&over No. (EE)	40 FF 5&over % of (EE)	40 FF 4&under No. (EE)	40 FF 4&under % of (EE)	40 Size unknown No. (EE)	40 Size unknown % of (EE)
Total, all cities....	1,209	3	↓	2	67	0	..	1	33	2	↓	0	..	0	..	2	100
Over 500,000.....	21	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
0,000 - 499,999....	22	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
100,000 - 249,999.....	78	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
50,000 - 99,999.....	165	0	..	..	..	..	..	..	..	0	..	..	..	..	..	..	..
25,000 - 49,999.....	321	1	↓	1	100	0	..	0	..	0	..	..	..	..	..	..	..
10,000 - 24,999.....	602	2	↓	1	50	0	..	1	50	2	↓	0	..	0	..	2	100

↓ less than .5%

Table 4 cont'd.

LENGTH OF FIREFIGHTERS DUTY CYCLE (in days) cont'd.

Population Group	No. of cities reporting (A)	42 Total No. (FF)	42 Total % of (A)	42 FF 5& over No. (FF)	42 FF 5& over % of (FF)	42 FF 4 &Under No. (FF)	42 FF 4 &Under % of (FF)	42 Size unknown No. (FF)	42 Size unknown % of (FF)	45 Total No. (GG)	45 Total % of (A)	45 FF 5& over No. (GG)	45 FF 5& over % of (GG)	45 FF 4& under No. (GG)	45 FF 4& under % of (GG)	45 Size unknown No. (GG)	45 Size unknown % of (GG)
Total, all cities...	1,209	10	1	8	80	0	---	2	20	↓	---	1	50	0	---	1	50
Over 500,000.....	21	0	---	---	---	---	---	---	---	(	---	---	---	---	---	---	---
50,000 - 499,999...	22	0	---	---	---	---	---	---	---	0	---	---	---	---	---	---	---
100,000 - 249,999....	78	2	3	2	100	0	---	0	---	1	1	1	100	0	---	0	---
50,000 - 99,999.....	165	1	1	1	100	0	---	0	---	0	---	---	---	---	---	---	---
25,000 - 49,999.....	321	4	1	3	75	0	---	1	25	0	---	---	---	---	---	---	---
10,000 - 24,999.....	602	3	↓	2	67	0	---	1	33	1	---	0	---	0	---	1	100

↓ Less than .5%

Table 4 cont'd.

LENGTH OF FIREFIGHTERS DUTY CYCLE (in days) cont'd.

Population Group	No. of cities reporting (A)	48 Total No. (HH)	48 Total % of (A)	48 FF 5& over No. (HH)	48 FF 5& over % of (HH)	48 FF 4 &Under No. (HH)	48 FF 4 &Under % of (HH)	48 Size unknown No. (HH)	48 Size unknown % of (HH)	49 Total No. (II)	49 Total % of (A)	49 FF 5& over No. (II)	49 FF 5& over % of (II)	49 FF 4& under No. (A)	49 FF 4& under % of (A)	49 Size unknown No. (II)	49 Size unknown % of (II)
Total, all cities...	1,209	1	↓	0	---	0	---	1	100	4	↓	3	75	0	---	1	25
Over 500,000.....	21	0	---	---	---	---	---	---	---	1	5	1	100	0	---	0	---
50,000 - 499,999....	22	0	---	---	---	---	---	---	---	0	---	---	---	---	---	---	---
100,000 - 249,999....	78	0	---	---	---	---	---	---	---	0	---	---	---	---	---	---	---
50,000 - 99,999.....	165	0	---	---	---	---	---	---	---	0	---	---	---	---	---	---	---
25,000 - 49,999.....	321	1	↓	0	---	0	---	1	100	1	---	1	100	0	---	0	---
10,000 - 24,999.....	602	0	---	---	---	---	---	---	---	2	---	1	50	0	---	1	50

↓ Less than .5%

Table 4 cont'd.

LENGTH OF FIREFIGHTERS DUTY CYCLE (in days) cont'd

Population Group	No. of cities reporting (A)	56 Total No. (JJ)	56 Total % of (A)	56 FF 5&over No. (II)	56 FF 5&over % of (II)	56 FF 4 &Under No. (II)	56 FF 4 &Under % of (II)	56 Size unknown No. (II)	56 Size unknown % of (II)	60 Total No. (KK)	60 Total % of (A)	60 FF 5&over No. (KK)	60 FF 5&over % of (KK)	60 FF 4&under No. (KK)	60 FF 4&under % of (KK)	60 Size unknown No. (KK)	60 Size unknown % of (KK)
Total, all cities....	1,209	27	2	16	59	0	...	11	41	3	↓	2	67	0	...	1	33
Over 500,000.....	21	1	5	1	100	0	...	0	...	0	...	...	...	...	...	...	...
,000 - 499,999....	22	2	9	2	100	0	...	0	...	0	...	...	...	...	...	...	...
100,000 - 249,999....	78	2	3	0	...	0	...	2	100	0	...	...	...	...	...	...	...
50,000 - 99,999.....	165	6	4	3	50	0	...	3	50	0	...	...	...	...	...	...	...
25,000 - 49,999.....	321	7	2	5	71	0	...	2	29	1	...	1	100	0	...	0	...
10,000 - 24,999.....	602	9	1	5	56	0	...	4	44	2	...	1	50	0	...	1	50

↓ less than .5%

Table 4 cont'd.

LENGTH OF FIREFIGHTERS DUTY CYCLE (in days) cont'd

Population Group	No. of cities reporting (A)	63 Total No. (LL)	63 Total % of (A)	63 FF 5&over No. (LL)	63 FF 5&over % of (LL)	63 FF 4 &Under No. (LL)	63 FF 4 &Under % of (LL)	63 Size unknown No. (LL)	63 Size unknown % of (LL)	64 Total No. (MM)	64 Total % of (A)	64 FF 5&over No. (MM)	64 FF 5&over % of (MM)	64 FF 4&under No. (MM)	64 FF 4&under % of (MM)	64 Size unknown No. (MM)	64 Size unknown % of (MM)
Total, all cities...	1,209	7	1	5	71	0	...	2	29	1	↓	1	100	0	...	0	...
Over 500,000.....	21	0	...	...	...	...	...	...	...	0	...	...	...	...	...	...	...
),000 - 499,999...	22	0	...	...	...	...	...	...	...	0	...	...	...	...	...	...	...
100,000 - 249,999...	78	1	1	1	100	0	...	0	...	0	...	...	...	...	...	...	...
50,000 - 99,999....	165	4	2	3	75	0	...	1	25	1	↓	1	100	0	...	0	...
25,000 - 49,999....	321	1	↓	1	100	0	...	0	...	0	...	...	...	...	...	...	...
10,000 - 24,999....	602	1	↓	0	...	0	...	1	100	0	...	...	...	...	...	...	...

↓ less than .5%

Table 4 cont'd.

LENGTH OF FIREFIGHTERS DUTY CYCLE (in days) cont'd

Population Group	No. of cities reporting (A)	72 Total No. (NN)	72 Total % of (A)	72 FF 5&over No. (NN)	72 FF 5&over % of (NN)	72 FF 4&Under No. (NN)	72 FF 4&Under % of (NN)	72 Size unknown No. (NN)	72 Size unknown % of (NN)	84 Total No. (OO)	84 Total % of (A)	84 FF 5&over No. (OO)	84 FF 5&over % of (OO)	84 FF 4&under No. (OO)	84 FF 4&under % of (OO)	84 Size unknown No. (OO)	84 Size unknown % of (OO)
Total, all cities..	1,209	1	↓	1	100	0	...	0	...	8	1	8	100	0	...	0	...
Over 500,000.....	21	0	...	...	...	...	...	...	...	0	...	...	...	...	...	...	...
,000 - 499,999..	22	0	...	...	...	...	...	...	...	0	...	...	...	...	...	...	...
100,000 - 249,999...	78	0	...	...	...	...	...	...	...	2	3	2	100	0	...	0	...
50,000 - 99,999....	165	0	...	...	...	...	...	...	...	2	1	2	100	0	...	0	...
25,000 - 49,999....	321	0	...	...	...	...	...	...	...	1	↓	1	100	0	...	0	...
10,000 - 24,999.....	602	1	↓	1	100	0	...	0	...	3	↓	3	100	0	...	0	...

↓ .. less than .5%

Table 4 cont'd.

LENGTH OF FIREFIGHTERS DUTY CYCLE (in days) cont'd

Population Group	No. of cities reporting (A)	98 Total No. (PP)	98 Total % of (A)	98 FF 5&over No. (PP)	98 FF 5&over % of (PP)	98 FF 4&Under No. (PP)	98 FF 4&Under % of (PP)	98 Size unknown No. (PP)	98 Size unknown % of (PP)	364 Total No. (QQ)	364 Total % of (A)	364 FF 5&over No. (QQ)	364 FF 5&over % of (QQ)	364 FF 4&under No. (QQ)	364 FF 4&under % of (QQ)	364 Size unknown No. (QQ)	364 Size unknown % of (QQ)
Total, all cities....	1,209	3	↓•	3	100	0	0	0	0	5	↓•	4	80	0	...	1	20
Over 500,000.....	21	0	...	...	...	...	...	...	...	1	5	1	100	0	...	0	...
,000 - 499,999....	22	0	...	...	...	...	...	...	...	0	...	...	...	...	...	...	...
00,000 - 249,999....	78	0	...	...	...	...	...	...	...	0	...	...	...	...	...	...	...
50,000 - 99,999.....	165	1	1	1	100	0	...	0	...	0	...	...	...	...	...	...	...
25,000 - 49,999.....	321	1	↓	1	100	0	...	0	...	0	...	...	...	...	...	...	...
10,000 - 24,999.....	602	1	↓	1	100	0	...	0	...	4	1	3	75	0	...	1	25

↓ less than .5%

• Percent of (A) adds up to 93% because there were 20 categories of ↓'s.

Table 4a

LENGTH OF FIREFIGHTERS DUTY CYCLE (IN DAYS)
IN UNITED STATES CITIES OVER 10,000; LESS THAN 7 DAYS

Population Group	No. of cities reporting (A)	Total No. (B)	Total % of (A)	FF 5 & over No.	FF 5 & over % of (B)	FF 4 & under No.	FF 4 & under % of (B)	Size unknown No.	Size unknown % of (B)
Total, all cities.	1,209	496	41	382	77	5	1	109	22
Over 500,000	21	7	33	6	28.6	0	---	1	14.3
150,000 - 499,999	22	12	54.5	12	54.5	0	---	0	---
100,000 - 249,999. .	78	24	30.8	22	28.2	0	---	2	8.3
50,000 - 99,999. . .	165	55	33.0	47	28.5	0	---	8	14.5
25,000 - 49,999. . .	321	129	40.2	110	34.3	3	2.3	16	12.4
10,000 - 24,999. . .	602	269	44.7	187	31.1	2	0.7	80	29.7

Table 4b

LENGTH OF FIREFIGHTERS DUTY CYCLE (IN DAYS)
IN UNITED STATES CITIES OVER 10,000; 7 THROUGH 28 DAYS

Population Group	No. of cities reporting (A)	Total No. (C)	Total % of (A)	FF 5 & over No.	FF 5 & over % of (C)	FF 4 & under No.	FF 4 & under % of (C)	Size unknown No.	Size unknown % of (C)
Total, all cities. . .	1,209	598	49.5	464	77.6	5	0.8	129	21.6
er 500,000	21	10	47.6	7	70	0	---	3	30
150,000 - 499,999. . .	22	8	36.4	7	87.5	0	---	1	12.5
100,000 - 249,999. . .	78	43	55.1	37	86	0	---	6	14
50,000 - 99,999. . . .	165	94	57	75	79.8	0	---	19	20.2
25,000 - 49,999. . . .	321	164	51.1	135	82.3	0	---	29	17.7
10,000 - 24,999. . . .	602	279	46.3	203	72.8	5	1.8	71	25.4

Table 4c

LENGTH OF FIREFIGHTERS DUTY CYCLE (IN DAYS)
UNITED STATES CITIES OVER 10,000; 29 OR MORE DAYS

Population Groups	No. of cities reporting (A)	Total No. (D)	Total % of (A)	FF 5 & over No.	FF 5 & over % of (D)	FF 4 & under No.	FF 4 & under % of (D)	Size unknown No.	Size unknown % of (D)
Total, all cities. . .	1,209	114	9.4	89	77.4	0	---	25	21.7
Over 500,000	21	4	19	4	100	0	---	0	---
150,000 - 499,999. . .	22	2	9.1	2	100	0	---	0	---
100,000 - 249,999. . .	78	11	14.1	9	81.8	0	---	2	18.2
50,000 - 99,999. . . .	165	16	9.7	12	75	0	---	4	25
25,000 - 49,999. . . .	321	27	8.4	23	85.2	0	---	4	14.8
10,000 - 24,999. . . .	602	54	9	39	72.2	0	---	15	27.8

Table 4d

LENGTH OF FIREFIGHTERS DUTY CYCLE (in days);
2 and 6 days; 29 or more days.

Population Group	No. of cities reporting (A)	2,3,4,5,6 and 29 thru 364 Total No. (G)	Total %of (A)	FF 5&over No.	FF 5&over %of (E)	FF 4&under No.	FF 4&under %of (E)	Size unknown No.	Size unknown %of (E)
Total, all cities.....	1,209	610	50.5	473	77.5	5	0.8	132	21.6
Over 500,000.....	21	11	52.4	10	90.9	0	..	1	9.1
250,000 - 499,999.....	22	14	63.6	14	100	0	..	0	...
100,000 - 249,999.....	78	35	44.9	31	88.6	0	..	4	11.4
50,000 - 99,999.....	165	71	43	59	83.1	0	..	12	16.9
25,000 - 49,999.....	321	156	48.6	133	85.3	3	19	20	12.8
10,000 - 24,999.....	602	323	53.7	226	70	2	0.6	95	29.4

Table 4e

CUMULATIVE PERCENTAGE OF LENGTH OF FIREFIGHTER DUTY CYCLE

Number of Days in Fire Duty Cycle	Number of Cities	Cumulative Number Cities	Cumulative % of Total Reporting (1209)
2	12	12	1
3	438	450	37.2
4	17	467	38.6
5	1	468	38.7
6	28	496	41.0
7	44	540	44.7
8	119	659	54.4
9	182	840	69.5
10	21	861	71.2
11	4	865	71.5
12	56	921	76.2
14	27	948	78.4
15	14	962	79.6
16	11	973	80.5
17	1	974	80.6
18	4	978	80.9
20	2	980	81.1
21	27	1007	83.3
22	1	1008	83.4
24	13	1021	84.4
25	1	1022	84.5
26	1	1023	84.6
27	13	1036	85.7
28	58	1094	90.5
30	27	1121	92.7
32	9	1130	93.5
33	1	1131	93.5
35	1	1132	93.6
36	3	1135	93.9
40	2	1137	94.0
42	10	1147	94.9
45	2	1149	95.0
48	1	1150	95.1
49	4	1154	95.5
56	27	1181	97.7
60	3	1184	97.9
63	7	1191	98.5
64	1	1192	98.6
72	1	1193	98.7
84	8	1201	99.3
98	3	1204	99.6
364	5	1209	100.0

Table 5

CUMULATIVE PERCENTAGE OF AVERAGE HOURS PER WEEK FIREFIGHTERS ARE ON DUTY

Average Fire Hours on Duty per Week	Number of Cities	Cumulative Number of Cities	Cumulative % of Total Reporting (1251)
37.3	1	1	0.1
40	46	47	3.8
40.3	1	48	3.8
42	142	190	15.2
42.5	2	192	15.3
44	2	194	15.5
45.8	1	195	15.6
46	1	196	15.7
46.9	1	197	15.7
47.5	1	198	15.8
48	39	237	18.9
49	1	238	19.0
50	3	241	19.3
50.2	2	243	19.4
50.3	1	244	19.5
50.4	5	249	19.9
50.5	1	250	20.0
51	1	251	20.1
51.3	2	253	20.2
52	7	260	20.8
52.2	1	261	20.9
52.3	1	262	21.0
52.5	1	263	21.0
53	2	265	21.2
53.3	1	266	21.3
53.5	1	267	21.3
54	8	275	22.0
54.6	1	276	22.1
55	2	278	22.2
55.2	1	279	22.3
56	702	981	78.4
56.3	1	982	78.5
57	1	983	78.6
57.4	1	984	78.7
57.5	1	985	78.7
57.84	1	986	78.8
58	7	993	79.4
58.1	2	995	79.5
58.6	3	998	79.8
58.7	1	999	79.8
58.8	2	1001	80.0
59	3	1004	80.3
59.5	2	1006	80.3
59.9	1	1007	80.5
60	50	1057	84.5

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Table 5 (cont'd.)

Average Fire Hours on Duty per Week	Number of Cities	Cumulative Number of Cities	Cumulative % of Total (1251)
60.1	2	1059	84.7
60.4	1	1060	84.7
60.9	1	1061	84.8
61	2	1063	85.0
61.1	2	1065	85.1
61.3	1	1066	85.2
61.4	1	1067	85.3
62	4	1071	85.6
62.3	3	1074	85.9
62.5	2	1076	86.0
63	46	1122	89.7
63.1	1	1123	89.8
63.3	1	1124	89.8
63.4	2	1126	90.0
63.5	1	1127	90.1
64	4	1131	90.4
64.3	1	1132	90.5
65	1	1133	90.6
65.3	1	1134	90.6
65.9	1	1135	90.7
66	19	1154	92.2
66.2	1	1155	92.3
66.3	1	1156	92.4
66.4	1	1157	92.5
67	3	1160	92.7
67.2	11	1171	93.6
67.4	2	1173	93.8
67.5	1	1174	93.8
68	3	1177	94.1
68.1	1	1178	94.2
69	1	1179	94.2
70	3	1182	94.5
70.2	1	1183	94.6
70.5	1	1184	94.6
71	1	1185	94.7
71.3	1	1186	94.8
72	47	1233	98.6
72.5	1	1234	98.6
72.6	1	1235	9817
73	1	1236	98.8
73.1	1	1237	98.9
73.5	1	1238	99.0
78	2	1240	99.1
78.4	2	1242	99.3
78.5	1	1243	99.4
84	7	1250	99.9
96	1	1251	100.0

Table 6

STATES HAVING LAWS REGULATING FIREFIGHTERS' HOURS

Alabama
*Arkansas
Georgia
Illinois
Indiana
Kentucky
*Maine
*Michigan
*Montana
New Hampshire
*New Jersey
*North Dakota
Ohio
Oregon
*Pennsylvania
*South Dakota
*Texas
Wisconsin

*Statute attached.

• • •

STATES HAVING NO LAWS REGULATING FIREFIGHTERS' HOURS

Arizona
California
Colorado
Florida
Iowa
Kansas
Minnesota
Mississippi
Missouri
New Mexico
North Carolina
Oklahoma
South Carolina
Tennessee
Utah
Virginia
Washington
Wyoming

[Statutes Regulating Firefighters' Hours–Attached to Letter from D. Slater, National League of Cities to W. Landis, Wage and Hour Division, Department of Labor, 7-5-74]

ARKANSAS

19-2102. Appointment of firemen in first class cities [Repealed.]

Repeal.

This section (Act Mar. 21, 1885, No. 67, § 2 (1st par.), p. 92; Feb. 27, 1893, No. 42, § 1 (3rd sentence), p. 64; C. & M. Dig., § 7709; Pope's Dig. § 9878) was repealed by Acts 1953, No. 554, § 1.

19-2103. Hours of service.–In all cities of the first class, as shown by the last Federal Census, and all subsequent censuses, which maintain or may hereafter maintain an organized paid, or part paid fire department, no employee of such department shall be compelled to be on duty more than fourteen [14] consecutive hours, except when changing from one tour of duty to the other, or in case of an epidemic among the members of the department, or a conflagration requiring the service of more than one-half [½] of the force of the department. [Acts 1923, No. 135, § 1, p. 115; Pope's Dig., § 9852.]

19-2104. Two Platoons – Arrangement of hours – Maximum hours per week – Exceptions – Epidemics, conflagrations or emergencies. – The uniformed force of the fire department shall be divided into two (2) platoons. The officers and members assigned to which shall alternate on tours of duty at intervals of not more than fifteen (15) days.

The head or chief officer of the fire department shall so arrange the working hours of the employees of such fire department so that each employee shall work, as near as practical, an equal number of hours per month; but not to exceed seventy-two (72) hours per week; provided that the head or chief officer of such department, may at his discretion, in case of an epidemic, conflagration, or

such emergency, require such employees for a greater period than herein provided to continue on duty during such epidemic, conflagration or like emergency. [Acts 1923, No. 135, §2 p. 115; Pope's Dig., § 9853; Acts 1947, No. 240, § 1, p. 512; 1957, No. 157, § 1, p. 481.]

Compiler's Note.

A last paragraph of this section was held unconstitutional in Mankin v. Dean (1958), 228 Ark. 752, 310 S. W. (2d) 477. Such paragraph read, "Provided that in cities or towns having a commission form of government with a full paid fire department, no member of the fire department in such city or town shall be required to be on regular duty more than an average of fifty-six (56) hours per week computed annually over the city's fiscal year or any unexpired portion thereof; provided, further, that said members of said fire departments, excepting administrative and maintenance personnel, shall perform their duties in twenty-four (24) hour shifts; and provided further that there shall be no reduction of salaries or rates of pay of members of said fire departments because of the number of hours prescribed in this Act as constituting the average work week of regular duty."

Amendments.

The 1947 amendment inserted the provision limiting the number of hours per week.

The 1957 amendment added a paragraph which was held unconstitutional. See compiler's note.

Emergency.

Section 2 of Acts 1947, No. 240, read: "It is found that firemen have been working an excessive number of hours each week and that this condition should be corrected in the interest of public safety. An emergency is therefore declared to exist and this act shall be in full force and effect from and after its passage and approval." Approved March 18, 1947.

CHAPTER 21–FIRE DEPARTMENT

SECTION.

19-2104.1. Cities with population of 15,000 or more–Equal number in platoons–Maximum hours–No reduction of salary–Epidemics, conflagrations or emergencies.

19-2106.1. Reimbursement for use of equipment beyond corporate limits.

19-2106.2. Liability for damages outside corporate limits.

19-2104.1. Cities with population of 15,000 or more – Equal number in Platoons – Maximum hours – No reduction of salary – Epidemics, conflagrations or emergencies. – Irrespective of the provisions of Section 2 [§ 19-2104] of Act 135 of 1923, as amended, the uniformed force of fire departments in cities of the State of Arkansas having a population of fifteen thousand (15,000) or more, according to the latest official United States Census shall be divided into platoons. The responsible chief officer of the Fire Department in cities of this State affected by this Act shall assign as near as practicable, an equal number of employees of said department to each platoon, so that each employee shall work, as near as practicable, an equal number of hours per month, but not to exceed an average of fifty-six (56) hours per week for each period of three weeks. Provided, that there shall be no reduction of salaries of employees of said fire departments because of the number of hours worked during each week as provided herein. Provided, further, that the head or chief officer of such department may, at his discretion, in case of an epidemic, conflagration or like emergency, require such employee

to continue on duty for a greater period than herein provided, during such epidemic, conflagration or like emergency. [Acts 1969, No. 326, § 1, p. 981; 1973, No. 278, § 1, p.–.]

Compiler's Note.

This section was also amended in 1973 by Acts 1973, ch. 151 which act was repealed by Acts 1973, No. 278, § 3.

Amendment.

The 1973 amendment in the second sentence substituted "an average of fifty-six (56) hours" for "64 hours" and inserted "for each period of three weeks" at the end of the sentence.

Repealing Clause.

Section 3 of Acts 1969, No. 326 repealed all laws and parts of laws in conflict therewith.

Section 3 of Acts 1973, No. 278, read: "Act 1951 of 1973 is hereby repealed."

Separability.

Section 2 of Acts 1969, No. 326, read: "If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable."

Effective Date.

Section 2 of Acts 1973, No. 278 provided that § 1 of the act should become effective on July 1, 1973.

Emergency.

Section 4 of Acts 1969, No. 326, read: "It is hereby found and determined by the General Assembly that the maximum work week for firemen is prescribed by law as 72 hours per week; that a work week of 72 hours is unduly long and that firemen cannot give the best service to the people of this State when required to work 72 hours per week; that the maximum work week of firemen in certain cities must be reduced in order that such firemen can provide the best possible fire protection to the residents of such cities; and that this Act is immediately necessary to correct this situation. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval." Approved March 26, 1969.

Section 4 of Acts 1973, No. 278 read: "The General Assembly finds that the maximum work week of firemen in certain cities, which is presently 64 hours per week, must be reduced in order that such firemen can provide the best possible fire protection to the residents of such cities; that Act 151 of 1973 did reduce said maximum work week to 56 hours per week, but that the immediate effectiveness of said Act 151 of 1973, caused by the fact that said Act 151 contained an emergency clause, has presented the cities to which said Act 151 applies with a financial problem for which they had not budgeted, and which they need time to meet. It is necessary, therefore, that said Act 151 of 1973 be immediately repealed and replaced by this Act. An emergency is therefore declared

to exist, and this Act being necessary for the public peace, health, and safety, shall be effective immediately upon its passage and approval." Approved March 9, 1973.

19-2106.1. Reimbursement for use of equipment beyond corporate limits.—When the organized fire department of a city or town combats a fire beyond the corporate limits of the city or town, a reasonable effort must be made for ninety (90) days to obtain compensation or reimbursement for such services from the property owner involved. However, if the city or town is unable to obtain payment or reimbursement from the property owner for such services within the ninety (90) day period, the county wherein said property is located may reimburse the municipality for such service in an amount not to exceed two hundred dollars ($200). [Acts 1973, No. 114, § 1, p. —.]

19-2106.2. Liability for damages outside corporate limits.—Neither the municipality nor any municipal official or fire department official or employee involved in combatting the fire shall be liable for any damages or loss that occurs while the fire department is combatting the fire outside the corporate limits of the city or town. Provided further however, that the fire fighter [fighters] shall have the same coverage as they now have if they are injured while outside the city limits. [Acts 1973, No. 114, §2, p. —.]

* * *

MAINE

Ch. 7, Sec. 663

7. Minimum wage for firemen. Members of municipal fire fighting departments, other than volunteer or

call-departments, who are paid salaries or regular wages, are deemed to be employees within the meaning of this section and are covered by this subchapter. Firemen's wages may be paid by the municipality based upon the average number of hours worked during any one work cycle which is not to exceed 12 weeks in duration. However, 1½ times the hourly rate shall not be paid for all work done over 48 hours under this subsection (1965, c. 399, § 1.) (1967, c. 385.)

* * *

MICHIGAN

Act No. 78, Public Acts of 1973 – Approved by Governor July 31, 1973

ENROLLED HOUSE BILL NO. 4609

AN ACT to amend section 2 of Act No. 125 of the Public Acts of 1925, entitled "An act to regulate the hours of labor of employes in the fire departments of municipalities, and providing penalties for the violation thereof," being section 123.842 of the Compiled Laws of 1970.

The People of the State of Michigan enact:

Section 1. Section 2 of Act No. 125 of the Public Acts of 1925, being section 123.842 of the Compiled Laws of 1970, is amended to read as follows:

Section 2. The provisions of section 1 shall not apply

(a) To the chief officer or the assistant chief officer in command of the fire department of a municipality.

(b) To employees of a fire department who are employed subject to call.

(c) To the members or employees of a fire department when required to remain on duty by the chief officer of such department, his aides or assistants, in cases of public necessity arising from great conflagration, riot, flood, epidemic of pestilence, or disease, necessary absence of regularly employed men due to military service, or for disciplinary measures.

(d) To the members of any volunteer fire department.

(e) To any municipality which, by agreement with the collective bargaining agent representing affected employees, does not require its employees engaged in fire fighting or subject to the hazards thereof, to be on duty more than 40 hours in any consecutive 7-day period.

This act is ordered to take immediate effect.

(40)

Act 125, 1925, p. 166; Eff. Aug. 27.

AN ACT to regulate the hours of labor of employes in the fire departments of municipalities, and providing penalties for the violation thereof.

The People of the State of Michigan enact:

123.841 Fire department employees; period of duty; days off duty; work hours per week.

Sec. 1. It shall be unlawful for any municipality, or any officer or employee thereof, in municipalities which maintain or may hereafter maintain an organized paid or part-paid fire department, to require any person in the employ of the fire department who is engaged in fire fighting or subject to the hazards thereof to be on duty in such employment more than 24 hours, or to be off duty

less than 24 consecutive hours out of any 48-hour period. All persons in the employ of any organized paid or part-paid fire department who are engaged in fire fighting or subject to the hazards thereof shall be entitled to an additional 24 consecutive hours off duty in every 12-day period, beginning July 1, 1966, thereby requiring firemen to work not more than an average of 63 hours per week, and effective July 1, 1967, an additional 24 consecutive hours off duty in every 6-day period, thereby requiring firemen to work not more than an average of 56 hours per week.

HISTORY: CL 1929, 2725;—Am. 1937, p. 49, Act 38, Eff. Oct. 29;—Am. 1941, p. 65, Act 57, Eff. Jan. 10, 1942;—Am. 1947, p. 632, Oct. 335, Eff. Oct. 11;—CL 1948, 123.841;—Am. 1965, p. 151, Act 115, Eff. Mar. 31, 1966.

123.842 Persons Exempt.

Sec. 2. The provisions of section 1 shall not apply

(a) To the chief officer or the assistant chief officer in command of the fire department of a municipality;

(b) To employees of a fire department who are employed subject to call;

(c) To the members or employees of a fire department when required to remain on duty by the chief officer of such department, his aids or assistants, in cases of public necessity arising from great conflagration, riot, flood, epidemic of pestilence or disease, necessary absence of regularly employed men due to military service, or for disciplinary measures; nor

(d) To the members of any volunteer fire department.

HISTORY: CL 1929, 2726;—Am. 1937, p. 49, Act 38, Eff. Oct. 29,—Am. 1947, p. 632, Act 335, Eff. Oct. 11,—CL 1948, 123.842.

123.843 Penalty for violations

Sec. 3. Any officer or employe or agent of such municipality who shall require any employe or other person in any such fire department, save as hereinbefore excepted in section 2 of this act, to be on duty in such employment for a longer time than that hereinbefore provided, or to be off duty for a lesser time than that hereinbefore provided, shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not more than 100 dollars or by imprisonment in the county jail for not more than 3 months, or by both such fine and imprisonment.

HISTORY: CL 1929, 2727,—CL 1948, 123.843.

Sec. 4. (This was a repeal section.)

HISTORY: CL 1929,2728;—Rep. 1945, p. 406, Act 267, Imd. Eff. May 25.

MONTANA

11-1931. Hours of work of members of paid fire departments in cities of first class. The city council, city commission, or other governing body in cities of the first class, shall divide all members of the paid fire department into platoons of three shifts. The members of each shift shall not be required to work or be on duty more than eight (8) hours of each consecutive twenty-four hours, except in the event of a conflagration or other similar emergency when such members or any of them may be required to serve so long as the necessity therefor exists. Each member shall be entitled to at least one (1) day off duty out of each eight-day period of service without loss of compensation.

11-1934. Hours of work of members of paid fire departments in second class cities. The city council, city

commission, or other governing body in cities of the second class, shall divide all members of the paid fire department into platoons of three shifts. The members of each shift shall not be required to work or be on duty more than eight (8) hours of each consecutive twenty-four hours, except in the event of a conflagration or other similar emergency when such members or any of them may be required to serve so long as the necessity therefor exists. Each member shall be entitled to at least one (1) day off duty out of each eight-day period of service without loss of compensation.

History: En. Sec. 1, Ch. 136, L. 1939.

Collateral References

Municipal Corporations 194.

62 C.J.S. Municipal Corporations § 600.

* * *

NEW JERSEY

40A:14-46 Two-platoon system in certain municipalities having a paid fire department and force.

The governing body of a municipality, having a paid fire department and force, by resolution, may divide the members and officers of such department and force into 2 platoons, one platoon serving 24 hours of duty while the other is off duty for the same period of time.

Source: R.S. 40:47–38.

40A:14-47 Two-platoon system for fire department in certain municipalities; establishment; referendum.

In municipalities, except cities of the first class, wherein a proposal for a 2-platoon system shall have been adopted the governing body of the municipality, or the

board or officer in charge of a paid or part-paid fire department and force, shall divide the paid members and officers of the said department and force into 2 platoons, one designated as a day force, the other as a night force. Each force, respectively, shall alternate the hours of duty on every fourth day. The hours of duty of the day force shall be from 8:00 A.M. to 6:00 P.M. and the night force from 6:00 P.M. to 8:00 A.M. the following morning, except that on every fourth day, for the purpose of such alternation the number of said hours of duty may be exceeded but one force shall be off duty at all times, except as otherwise provided by law.

The 2-platoon system shall be inoperative unless and until a proposal for such a system shall have been submitted to and adopted by the legal voters of the municipality at a primary or general election or at an election held for that purpose. It may be submitted as a public question, in the manner prescribed by law, by resolution of the governing body, or by filing with the governing body of the municipality a petition for such submission signed by at least 10% of the legal voters of the municipality in substantially the following form:

"(Insert the name of the municipality and state the question.)" The ballot shall contain 2 squares to the left of the question, one with the word "Yes", the other with the word "No", respectively, to the right thereof. The ballot shall also contain instructions to voters to vote by marking a cross (X), or plus sign (+) or check mark ( ) in the square according to their choice. If voting machines are used a vote of "Yes" or "No" shall be equivalent to such markings, respectively.

The municipal clerk shall forthwith canvass the returns of the election and shall certify the results thereof to the

governing body of the municipality. If a majority of the legal voters voting on the question shall vote "Yes", the 2-platoon system shall become operative and the governing body or the board or officer in charge of said paid or part-paid fire department and force shall then proceed to establish such system.

This section shall not be construed to repeal or modify in any form any existing law relating to salaries, annual vacations, sick or disability leave of any of the members or officers of the paid or part-paid fire department or force.

Source: R.S. 40:47-39; 40:47-40 amended 1938, c. 276; 40:47-42; 40:47-43; 40:47-44; 40:47-45; 40:47-46; 40:47-47; 40:174-66; 40:174-67; 40:174-68; 40:174-69; 40:174-70; 40:174-71; 40:174-72.

40A:14-48 Two-platoon system for fire department in cities of the first class: emergency service; compensatory time off.

In cities of the first class, the governing body, by resolution, or the board of fire commissioners or officials in charge of a fire department and force, may divide the members and officers of such fire department and force into 2 platoons, one serving while the other is off duty. Each platoon, respectively, shall alternate the hours of duty for the purpose of alternating the day force with the night force and vice versa, and for the purpose of giving each platoon 24 hours off duty every 6 days. The hours of duty of the day force shall be from 8:00 A.M. to 6:00 P.M. and the night force from 6:00 P.M. to 8:00 A.M. the following morning.

In cases of conflagration or other emergency the officials in charge of the fire department and force shall have authority to retain on duty any or all members and

officers of such department and force during the period of the emergency, but in any such case and within 12 months thereafter, such members or officers shall be given a day or proportion thereof off for extra time so served by them during the emergency.

Nothing contained herein shall be deemed to repeal or modify existing laws relating to salaries, annual vacations or sick or disability leaves of the members or officers of such department or force.

Source: R.S. 40:174-132; 40:174-133; 40:174-134; 40:174-135; 40:174-136; 40:174-137; 40:174-138; 40:174-139; 40:174-140.

40A:14-49 Fifty-six hour week for members and officers; referendum.

The governing body of any municipality, by ordinance, may adopt a schedule of hours of actual duty for the members and officers of a paid or part-paid fire department and force based upon an average of 56 hours per week in any 6-week cycle, but in cases of emergency the officials in charge shall have authority to retain any uniformed member or officer on duty during the period of the emergency, and in any such case and within 12 months thereafter such member or officer shall be given hours off from the average of 56 hours per week in any 6-week cycle to compensate him for the extra hours served by him during such emergency.

Any such ordinance shall be inoperative unless and until it shall be submitted to and adopted by the legal voters of the municipality at a primary or general election or an election held for such purpose.

Said adoption may be submitted as a public question in the manner prescribed by law, by resolution of the governing body or by filing with the governing body a

petition for such submission, signed by at least 10% of the registered voters of the municipality. The question shall be submitted substantially on the ballot as follows:

Insert the name of the municipality and state the question. "Shall the ordinance providing that the uniformed members and officers of its fire department and force shall be maintained in such manner as to provide that no member or officer thereof shall be required to remain on duty in excess of 56 hours per week in any 6-week cycle except in cases of emergency be adopted?"

If a majority of the legal voters voting on such question vote in favor of the adoption, the ordinance on and after January 1 following such election shall become operative.

Source: C. 40:47-47.2 (1948, c. 73, s. 1 amended 1949, c. 100, s. 2); C. 40:47-47.3 (1948, c. 73. s. 2 amended 1949, c. 100, s. 3); C. 40:47-47.4 (1948, c. 73, s. 3 amended 1949, c. 100, s.4).

* * *

NORTH DAKOTA

GENERAL PROVISIONS

34-01-08 Maximum hours for cities in this state having a population of *five thousand* or more inhabitants shall work for such city more than eight hours in any one day or more than fifty-six hours in any one week except in case of emergency. This section shall not apply to a public officer who is elected to his said office, nor to members of the police force, nor to the members and employees of the fire department, nor to the head of any department of the city.

Source: S.I., 1935, ch. 201, § 1; 1937, ch. 177, § 1; R.C. 1943, § 34-0108.

Cross-Reference.

Civil Service for city employees, see ch. 40-44.

Collateral References.

Labor Relations 1367, 1379.

48 Am. Jur. 2d, Labor and Labor Relations, § 1863.

51B C.J.S. Labor Relations, § 1197; 56 C.J.S. Master and Servant, § 17.

34-01-09. Violation of hours of employment for city employees – Penalty. – Any employee who shall willfully violate section 34-01-08, and any city officer and any member of any board, bureau, or commission having charge of or supervision over the employment of any such employee who shall require such employee to violate such section, is guilty of a misdemeanor and shall be punished by a fine of not less than ten dollars nor more than one hundred dollars, or by imprisonment in the county jail for not more than thirty days, or by both such fine and imprisonment.

Source: S.L. 1935, ch. 201, § 2; 1937, ch. 177, § 2; R.C. 1943, § 34-0109.

34-01-09.1. Maximum hours of labor. – No employee, other than the chief of a fire department in any city of North Dakota with a population of twenty thousand or more inhabitants, shall be required to work more than one hundred and forty-four hours in any two-week period but shall be subject to call while off duty in case of emergency not to exceed more than one hundred and forty-four hours in this two-week period. Any person who shall violate any provision of this section shall be guilty of a misdemeanor and shall be punished by a fine

of not less than twenty-five dollars nor more than one hundred dollars.

Source: S.L. 1949, ch. 223, §§ 1, 2; R.C. 1943, 1957 Supp., §§ 34-01091, 34-01092.

Note.

The provisions of section 34-01-09.2 have been combined with this section.

Collateral References.

Labor Relations 1351-1420.

48 Am. Jur. 2d, Labor and Labor Relations, §§ 1838-1865.

51B C.J.S. Labor Relations, §§ 1186-1209; 56 C.J.S. Master and Servant, §§ 14-17.

Beauty Shops, control of hours of work by statute or ordinance regulating, 56 ALR 2d 892.

34-01-09.2. Penalty.—Repealed by omission from this code.

Note.

The provisions of this section have been combined with section 34-01-09.1.

* * *

PENNSYLVANIA

THIRD CLASS CITY CODE OF PENN.
53 PURDON'S STATUTES 37103

Section 2103. Platoon System; Hours of Service; Vacation; Sick Leave.—The director of the department having charge of the fire bureau in each city shall divide the officers and members of companies of the uniformed

fire force in the employ of such cities, and any other firemen and drivers regularly employed and paid by the city, excepting the chief engineer and assistant chiefs, and those employed subject to call, into two bodies or platoons to perform service during such hours as the director shall fix, except as herein otherwise provided.

The hours of day service shall not exceed ten, commencing at eight o'clock in the morning, the hours of night service shall not exceed fourteen, commencing at six o'clock in the afternoon; and the hours of day service shall not exceed fifty hours in any one calendar week, and the hours of night service shall not exceed seventy hours in any one calendar week, unless the hours of day and night service shall be equalized, in which case neither the hours of day or night service shall exceed fifty-six in any one calendar week: Provided, That for the duration of any war in which the United States is engaged, and six months thereafter, the hours of service may exceed the number hereinbefore provided as the maximum number of hours of service, and in such cases, council shall provide for the payment of extra compensation for any hours of service, at the same rate as paid for regular service in excess of such maximum hours of service. The employes of such fire forces shall be allowed to have at least twenty-four consecutive hours of rest in every calendar week, to have an annual vacation of not less than fourteen working days, and shall be entitled to twenty-one days sick leave annually without diminution of the salary or compensation fixed by ordinance. In those instances in which sick leave exceeds four days at any one time, it shall be necessary for the employe to present evidence satisfactory to the director of the department showing either injury, hospitalization, or

illness attended to by a physician. In cases of riot, serious conflagration, times of war, public celebrations, or other such emergency, the chief engineer of the bureau of fire, or the assistance chief deputy, or chief officer in charge at any fire shall have the power to assign all the members of the fire force to continuous duty, or to continue any member thereof on duty, if necessary. No member of any of said shifts, bodies or platoons shall be required to perform continuous day service or continuous night service for a longer consecutive period than two weeks, nor be kept on duty continuously longer than ten hours in the day shifts, bodies or platoons or fourteen hours in the night shifts, bodies or platoons, excepting as may be necessary to equalize the hours of duty and service, and also excepting in cases of emergency, as above provided. (Amended July 19, 1957, P.L. 1012.)

Section 2104. Fire Marshal; Powers. – Every city may, by ordinance, provide for the creation of the office of fire marshal who shall be appointed by the mayor, by and with the approval and consent of council, biennially. The fire marshal and his assistants, if council shall provide for such assistants, shall inspect all constructions or buildings within the city or upon property owned or controlled by the city or a municipality authority of the city within the Commonwealth, whether public, private, or business, and shall enforce all laws of the Commonwealth and ordinances of the city relating to such constructions or

* * *

SOUTH DAKOTA

CLASSIFICATION AND CONDITIONS OF EMPLOYMENT 3-6-18

duties of employees, within the time designated, the classifications, the minimum essentials of efficiency, the uniform system of efficiency ratings, the equitable salary scale, the plan for pooling and transferring clerks, stenographers, clerical assistants, and common and skilled laborers, and the plan for co-ordination of duties of employees, submitted by the director of employment shall thenceforth be in full force and effect. Such classifications, minimum essentials of efficiency, uniform system of efficiency ratings, equitable salary scale, plan for pooling and transferring clerks, stenographers, clerical assistants, and common and skilled laborers and plan for co-ordination of duties of employees shall continue in force and effect until amended or revised by a majority vote of the board of finance at any regular meeting.

Source: SL 1927, ch 73; SDC 1939, 55.2701 (9).

Cross-Reference.

Rules and regulations, procedure for adoption, §§ 1-26-2 to 1-26-14.

3-6-17. Maximum hours of duty for public employees – Special provision for city firemen. – No employee of the state or any of its political subdivisions, nor of any municipal corporation shall be employed more than eight hours in any day, nor more than forty-eight hours in any calendar week except in case of unavoidable emergency, and except that full-time employees of city fire departments shall have their own hours of employment governed by a mutual agreement with respective

municipal corporations and shall not exceed one hundred twelve hours during a fourteen-day period.

Source: SL 1933 (SS), ch 10, § 2; R.C. 1939, § 17.0103; SL 1949, ch 75,–; 1951, ch 93, § 1; 1959, ch 100; 1966 ch 63, § 12.

Cross-References.

Legislative employees, hours of duty, § 2-5-7.

Record of attendance for state employees, § 3-6-11.

Workmen's Compensation Computation.

Statute which fixes maximum number of hours public employee may be required to work is not applicable in computing daily wage under workmen's compensation statute. Millage v. Canton Township (1949) 73 SD 26, 38 NW 2d 755.

Opinions of Attorney General.

"Emergency" as applied to circumstances arising at Yankton state hospital, Report 1949-50, p. 209.

Not unlawful to employ in excess of eight hours, permitted in emergency cases, Report 1955-56, pp. 278, 318.

Overtime pay permitted when caused by unavoidable emergency, Report 1943-44, p. 150; 1955-56, p. 299.

Overtime pay permitted when employee works hours beyond those contemplated at time of employment, Report 1943-44, p. 215.

3-6-18. Public officers and agricultural workers exempt from restriction on hours.–Nothing in § 3-6-17 shall be construed to apply to public officers elected or appointed as such for any specific term or part of a term.

* * *

TEXAS

Art. 1269p CITIES, TOWNS AND VILLAGES Title 28

Art. 1269p. Hours of labor and vacations of firemen and policemen in certain cities.

Cities over 25,000; hours of labor

Section 1. No member of any fire department or police department in any city of more than twenty-five thousand (25,000) inhabitants shall be required to be on duty more than six (6) days in any one week.

Exception for emergencies

Sec. 2. The preceding subdivision shall not apply to cases of emergency.

Cities over 30,000; vacations

Sec. 3. Each member of any such departments in any city of more than thirty thousand (30,000) inhabitants shall be allowed fifteen (15) days vacation in each year with pay; provided that the provisions of this Section of this Act shall not be applied to any member of any such department in any city of more than thirty thousand (30,000) inhabitants unless such member shall have been regularly employed in such department or departments for a period of at least one (1) year.

Number of vacation days and holidays

Sec. 3a. Firemen and Policemen shall have the same number of vacation days and the same number of holidays, or days in lieu thereof, that is granted to other municipal employees.

Federal Census

Sec. 4. Each preceding Federal Census shall determine the population.

Designation of vacation days and holidays

Sec. 5. The city officials having supervision of the fire department and police department shall designate the days of the week upon which each such member shall not be required to be on duty, and the days upon which each such member shall be allowed to be on vacation.

Cities over 10,000; hours of labor

Sec. 6. It shall be unlawful for any city having more than ten thousand (10,000) inhabitants but not more than sixty thousand (60,000) inhabitants, according to the last preceding Federal Census, to require or permit any fireman to work more than seventy-two (72) hours during any one calendar week. It shall be unlawful for any city having more than sixty thousand (60,000) inhabitants but not more than one hundred twenty-five thousand (125,000) inhabitants, according to the last preceding Federal Census, to require or permit any fireman to work more than an average, during a calendar year, of sixty-three (63) hours per week. It shall be unlawful for any city having more than one hundred twenty-five thousand (125,000) inhabitants, according to the last preceding Federal Census, to require or permit any fireman to work more than an average, during a calendar year, of sixty (60) hours per week.

Provided further, that in any city having more than ten thousand (10,000) inhabitants, according to the last preceding Federal Census, the number of hours in the work week of members of the fire department whose duties do not include fighting fires, including but not limited to mechanics, clerks, investigators, inspectors, fire marshals, fire alarm dispatchers and maintenance men, shall not exceed the number of hours in the normal work week of the majority of the employees of said city other than firemen and policemen.

Provided further, that in computing the hours in the work week of firemen subject to the provisions of the preceding paragraph, there shall be included and counted any and all hours during which such firemen are required to remain available for immediate call to duty by continuously remaining in contact with a fire department office by telephone or by radio.

Provided, however, that in any such city having more than ten thousand (10,000) inhabitants, in the event of an emergency, firemen may be required to work more than the maximum number of hours herein provided; and in such event firemen working more than the maximum hours herein provided shall be compensated for such overtime at a rate equal to one and one-half times the compensation paid to such firemen for regular hours.

Cities over 10,000; overtime

Sec. 6A. It shall be unlawful for any city having more than ten thousand (10,000) inhabitants, according to the last preceding Federal Census, to require or permit any policeman to work more hours during any calendar week than the number of hours in the normal work week of the majority of the employees of said city other than firemen and policemen.

Provided, however, that in any such city having more than ten thousand (10,000) inhabitants, in the event of an emergency, policemen may be required to work more than the number of hours in the normal work week of the majority of other city employees; and in the event policemen are ordered to work a greater number of hours than the number of hours in such normal work week of other city employees, such policemen shall be

compensated for any such overtime at a rate equal to one and one-half times the compensation paid to such policemen for regular hours.

Effectiveness of Act

Sec. 6B. The governing body of each city which comes under the provisions of this Act[1] shall put into effect the provisions hereof, without referendum or election, on or before the first day of the next fiscal year of such city after the effective date of this Act.

Working extra hours

Sec. 7. The provisions of this Act shall not be construed to prevent firemen and policemen from working extra hours when exchanging hours of work with each other with the consent of the department head.

Penalty

Sec. 8. The city official having charge of the fire department or police department in any such city who violates any provision of this Act shall be fined not less than Ten ($10.00) Dollars nor more than One Hundred ($100.00) Dollars, and each day on which said city official shall cause or permit any Section of this Act to be violated shall constitute and be a separate offense.

Defendant's Exhibit No. 5

CITY OF LOMPOC CALIFORNIA
CITY HALL
119 WEST WALNUT AVENUE
TELEPHONE REgent 6-1261

September 27, 1974

Mr. Charles S. Ryhne
National Institute of Municipal
Law Officers
839 17th Street, N.W.
Washington, D.C. 20006

Dear Mr. Ryhne:

I note that you have been retained as Chief Counsel for the National League of Cities to take on the 1974 Fair Labor Standards Act as it applies to the states or local governments.

I have been fighting what I consider to be a lonely skirmish on this battleground. The attached materials document my point. To put it bluntly the Department of Labor, in its approach to compensatory time, is flat wrong and will not condescend to think about changing its position but instead cites a case which does not apply to compensatory time.

So far as I am concerned this City is going to continue to pay compensatory time and if the Department of Labor objects we will win the point in court.

You may find that the point I urge is of some persuasive value in your case. I presume your case will be

one of urging states' rights, and my point indicates what kind of a right is interfered with: i.e. the right for a public employee and his employer to decide upon compensatory time as compensation for labor.

I will be in San Diego 7th and 8th if you wish to discuss the point further.

Very truly yours,

/s/ Alan Davidson
ALAN DAVIDSON
City Attorney

June 3, 1974

U.S. Department of Labor
Washington, D.C.

ATTENTION: Assistant Secretary Bernard E. Delury

Gentlemen:

We understand that it is the interpretation of the Department of Labor that under the 1974 Fair Labor Standards Act that cities may no longer give compensatory time to employees who have worked overtime, but must only pay them money. It was our interpretation of the law that "comp." time could still be given, but that at a rate of time and one-half.

If it is the department's position that only money can be paid for overtime, we would appreciate its specifying the section of the Code or Act upon which such an interpretation is based.

Very truly yours,

ALAN D. DAVIDSON
City Attorney

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WASHINGTON, D.C. 20210

Mr. Alan D. Davidson
City Attorney
119 West Walnut Ave.
Lompoc, California

Dear Mr. Davidson:

Your letter of June 3, 1974 to Assistant Secretary of Labor Bernard E. Delury has been referred to this office for a reply. In your letter you question the Department's position regarding compensatory time off under the Fair Labor Standards Act.

The overtime compensation requirements of the Act are discussed in the enclosed bulletin, Part 778. Section 778.106 indicates that the payment of both the minimum wage and overtime compensation due an employee must ordinarily be made at the regular payday for the period in which the work was performed. An employer may not credit an employee with compensatory time (even at a time and one-half rate) for overtime earned which is to be taken at some mutually agreed upon later date subsequent to the end of the pay period in which the overtime was earned, rather than pay cash for the overtime as it is earned.

However, it is permissible for the employer employing one at an hourly rate, or at a fixed salary for a fixed workweek, to lay off the employee a sufficient number of hours during some other week or weeks of the same pay period to offset the amount of overtime worked (i.e.

at the time and one-half rate) so that the desired wage or salary for the pay period covers the total amount of compensation, including overtime for each week taken separately. Under this method the employer does not average hours over a period longer than a week. He controls the earnings by controlling the number of hours the employee is permitted to work.

If you need additional information, you may wish to contact our office in Room 504, 6777 Hollywood Boulevard, Hollywood, California 90028, phone 213-472-3181, Ext. 373. The people in that office will be happy to help you in any way possible.

Sincerely,

/s/ William Hoffman
William Hoffman, Chief
Division of Minimum Wage
and Hour Standards
Wage and Hour Division

Enclosure

Section 778.106 Time of Payment.

There is no requirement in the Act that overtime compensation be paid weekly. The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends. When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next pay day after such computation can be made. Where retoactive wage increases are made, retroactive overtime compensation is due at the time the increase is paid, as discussed in §778.303. For a discussion of overtime payments due because of increases by way of bonuses, see §778.209.

CITY OF LOMPOC
CALIFORNIA
CITY HALL
119 WEST WALNUT AVENUE
TELEPHONE REgent 6-1261

July 16, 1974

William Hoffman
Chief, Division of Minimum Wage
and Hour Standards
Wage and Hour Division
United States Department of Labor
Washington, D. C. 20210

Thanks to your kind reply, we have received the United States Department of Labor Interpretive Bulletin No. 788 which is part of Title 29 of the Code of Federal Regulations relating to overtime compensation. This interpretive bulletin interpreted the Fair Labor Standards Act of 1938. It is still being used to interpret the recently adopted Fair Labor Standards Act of 1974, which added public employees to this Act.

Section 778.106 covers the question of when payment for overtime shall be made and quite properly indicates that payment in cash shall be made at the earliest payday. Delays are only allowed when computation cannot immediately be made. This interpretation is most correct in relating to cash payments because such delayed payment can be less than full payment, for several reasons.

This section has been applied to overtime compensation which compensation will be in the form of compensatory time (leave from work) at the rate of one

and one-half times the overtime worked. This means under strict application of section 778.106, and as reflected in your letter on the subject, that any time and one-half compensatory time must be given the same pay period. Because, however, the practical necessities of scheduling work and workloads do not fit into a compensatory scheme designed to discharge the employers obligation in a one or two-week or even one-month payroll period, the practical application means that compensatory time cannot be used. (Compensatory time is given employees at the time of slack periods.) Slack periods relate to the demands of the work, not pay theories and practices. *The upshot of the interpretation is that the giving of compensatory time by public bodies to their employees is effectively prohibited under the 1974 Act.* A review of the provisions of the 1974 Act do not show an intention of Congress to change the salutary and often practiced granting of compensatory time to public employees.

There are several considerations relating to compensatory time which should be seriously considered by the Secretary of Labor:

1. If the employee (whom we are trying to protect) prefers compensatory time off to money, and many of them do, he should not be thwarted in the receiving of such time by rules promulgated by the Department. Such an important principle should be clearly and exactly decided by Congress itself.

2. Many jurisdictions have varying work loads but may not have the money to pay the time and one-half in cash. To require the jurisdiction to pay money and not be able to use slack work periods for this compensation is a consequence not clearly indicated by Congress.

Compensatory time off in public employment is 99 percent of the time granted to an employee at his request, he tacks it onto weekends and vacations. Compensation time is of great utility to the employer and the employee alike and should not be thrown out by these rules.

3. There is no reason why there could not be a reasonable limit on the granting of compensatory time. Section 778.106, or a similar section, could provide that if compensatory time is to be given it shall be given at the same rate as is overtime pay but must be given within a reasonable time, i.e., six months or one year.

4. These rules are backing public jurisdictions into a guaranteed 40-hour week. Such a principle should only be adopted by Congress, and clearly so. The reason is this: if the time and one-half is paid in cash the next pay period, and then three months later a slack period appears and the employer gives the employee time off, this time off will be *without pay*. (If this time off were credited against the overtime account, it would be *with pay*.) Thus, if the employer who has ups and downs in his work load must allow employees time without pay because he doesn't have the money to pay them at the time, it is going to be creating a hardship on the employees. They will have pay periods where they will get large overtime pay and pay periods where they will get small pay. This causes hardship and resultant poor employee relations, with increased union activity and demand for guaranteed minimum 40-hour weeks. We request that the Department not back public jurisdictions into such a corner by the inadvertent application of a section relating to payment in cash.

This is a request that the Secretary of Labor consider and enter into an adoption of interpretive rules relating

to compensatory time used as compensation under the Fair Labor Standards Act, and that he (or whoever) specifically either provide that Section 778.106 does not apply to non-cash payment or adopt a new section covering the problems raised by the granting of compensatory time.

This question is not merely the concern of the undersigned. From materials I have observed, the National League of Cities has published this interpretation and I know from experience it is being followed by most public jurisdictions. I have determined this is particularly true in California. The problems caused by applying this section to compensatory time are immediate and I ask that you move quickly on this matter.

Yours truly,

/s/Alan D. Davidson
ALAN D. DAVIDSON
City Attorney

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WASHINGTON, D.C. 20210

Alan D. Davidson, Esq.
City of Lompoc
119 West Walnut Avenue
Lompoc, California 93436

Dear Mr. Davidson:

This is in reply to your letter of July 16, 1974, regarding the Department's position with respect to compensatory time-off under the Fair Labor Standards Act.

There is not much that we can add to that which we wrote you on July 9, 1974. By its own terms, the Act requires that overtime compensation be computed and paid on the basis of each workweek standing alone. This is a long established principle which has been in effect since the law's inception and which has been upheld by the courts. See the Supreme Court's opinion in *Walling* v. *Harnischfeger Corporation*, 325 U.S. 427 (1945). That decision indicates that overtime payments must be made within the regular pay period, unless for some reason delay is required to allow the employer to compute overtime payments. Where delay is unavoidable, payment must be made as soon as practicable. Neither the Administrator of the Wage and Hour Division nor the Secretary of Labor has specific authority to waive this requirement.

There is no indication that Congress, in enacting the 1974 amendments to the Act, contemplated any change in the requirement that overtime due under the Act must be paid in cash upon completion of the pay period and not in the form of compensatory time-off at some subsequent date.

Sincerely,

/s/ William Hoffman
William Hoffman, Director
Division of Minimum Wage
and Hour Standards
Wage and Hour Division

Defendant's Exhibit No. 6

CITY OF CAPE GIRARDEAU
CAPE GIRARDEAU, MISSOURI 63701

October 15, 1974

Mr. Jack. R. Younce
Area Director
Wage and Hour Division
Department of Labor
Room 563, 210 North 12th Street
St. Louis, Missouri 63101

Mr. James McDonald
Compliance Officer
Room 142, Federal Office Building
Box 554, 339 Broadway
Cape Girardeau, Missouri 63701

Re: Minimum Wage Law Compliance

Gentlemen:

By this letter I must inform you that the City of Cape Girardeau, Missouri, will not comply in any fashion with the Fair Labor Standards Act of 1974 and will make itself available for no audits or inspections of any kind. After careful consideration and study, it has been determined that the Fair Labor Standards Act of 1974 is and shall be treated as being unconstitutional.

It is our every intention and our desire to obey the law. We take this action very regretfully and after much

soul-searching. However, in view of the nature of local governments, the tradition and growth of local governments, and the constitutional basis for local governments, we can take no other action but to deny the constitutionality of this Act as it applies to our City.

Please be advised, however, that in the event this Act is ruled to be constitutional, the City of Cape Girardeau, of course, will comply with the Fair Labor Standards Act of 1974 and will do so fully and immediately. However, we expect the test case on the Fair Labor Standards Act of 1974 to be decided in favor of States and Local Governments and against the Federal Congress, i.e. unconstitutional.

Again, I want to say that we take this action not in an effort to beat the law or in an effort to break the law, but because of our considered and counseled opinion that this Fair Labor Standards Act of 1974 is, in fact, not the law because of its unconstitutionality.

We will await communication with you on the matter and if we can further clarify our position in any way, please feel free to call or contact me.

Very truly yours,

Thomas M. Utterback
City Attorney

Defendant's Exhibit No. 7

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
911 WALNUT STREET – ROOM 2106
KANSAS CITY, MISSOURI 64106

November 20, 1974
KCL:DM:DRB

Mr. Thomas M. Utterback
City Attorney
City of Cape Girardeau
Cape Girardeau, Missouri 63701

Re: *Brennan* v. *City of Cape Girardeau, Missouri*

Dear Mr. Utterback:

Enclosed is a copy of a complaint which we have sent for filing in the United States District Court at St. Louis, Missouri. Formal service will be made upon Mr. Lawley in due course.

Should you so desire, we would be pleased to discuss the case with you at an early date.

Sincerely,

T.A. Housh, Jr.
Regional Solicitor

By /s/ Donald McCoy
Donald McCoy
Attorney

Enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,	)	CIVIL ACTION
Plaintiff,	)	FILE NO.
v.	)	
CITY OF CAPE GIRARDEAU, MISSOURI,	)	
Defendant.	)	

COMPLAINT

Plaintiff brings this action to enjoin defendant from violating the provisions of section 15(a)(2) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201 *et seq.*), hereinafter called the Act, including the restraint of any withholding of payment of minimum wages and overtime compensation found by the Court to be due employees under the Act.

I

Jurisdiction of this action is conferred upon the Court by section 17 of the Act.

II

Defendant, the City of Cape Girardeau, Missouri, is a political subdivision of the State of Missouri located in the county of Cape Girardeau, Missouri, within the jurisdiction of this Court.

III

The activities of defendant, a public agency as defined by section 3(x) of the Act, were, and are, related and performed through unified operation or common control for a common business purpose, and have, since May 1, 1974, constituted an enterprise within the meaning of section 3(r) of the Act.

IV

At all times since May 1, 1974, said enterprise has had employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce and has been a public agency as defined in section 3(x) of the Act. Said enterprise, therefore, was and is an enterprise engaged in commerce or in the production of goods for commerce as defined in section 3(s)(5) of the Act.

V

Defendant has violated and is violating the provisions of sections 6(b) and 15(a)(2) of the Act by failing to pay to certain of its employees, for their employment in an enterprise engaged in commerce or the production of goods for commerce, wages at rates not less than $1.90 per hour since May 1, 1974.

VI

Defendant has violated the provisions of section 7 and 15(a)(2) of the Act by employing certain of its employees in an enterprise engaged in commerce or in the production of goods for commerce, for workweeks longer than 40 hours since May 1, 1974, without compensating said employees for their employment in excess of 40 hours in such workweeks at rates not less than one and one-half times the regular rates at which they were employed.

VII

As a result of the violations alleged in paragraphs V and VI hereof, defendant has unlawfully withheld and continues to withhold unpaid minimum wages and overtime compensation due certain of its employees.

VIII

Defendant has repeatedly and willfully violated the aforesaid provisions of the Act. A judgment permanently enjoining and restraining the violations herein alleged including the restraint of the continued withholding of unpaid minimum wages and overtime compensation due defendant's employees is specifically authorized by section 17 of the Act.

WHEREFORE, cause having been shown, plaintiff prays judgment permanently enjoining and restraining defendant, its officials, agents, servants, employees, and those persons in active concert or participation with defendant who receive actual notice thereof, from violating the provisions of section 15(a)(2), including the restraint of any withholding of payments of unpaid

minimum wages and overtime compensation found by the Court to be due to defendant's employees, together with interest thereon from the dates when such amounts became due, and for such other and further relief as may be necessary and appropriate, and costs.

William J. Kilberg
Solicitor of Labor

T. A. Housh, Jr.
Regional Solicitor
Room 2106, 911 Walnut Street
Kansas City, Missouri 64106
(816) 374-2281

/s/ Donald McCoy
Donald McCoy
Attorney
United States Department of Labor

and

Donald J. Stohr
United States Attorney

Office of the Attorney
1114 Market Street
St. Louis, Missouri 63101
(314) 622-4205

By
Michael W. Reap
Assistant United States Attorney

Attorneys for Plaintiff

Defendant's Exhibit No. 8

CAPE GIRARDEAU SOUTHEAST
MISSOURIAN 11-17-74

AUTONOMY OF LOCAL GOVERNMENT
THREATENED BY LABOR REGULATION
BY MAYOR HOWARD C. TOOKE

On Oct. 15, 1974, the City of Cape Girardeau gave written notice to the Wage and Hour Division of the Department of Labor that the city believes the application of the Fair Labor Standards Act to minicipalities is unconstitutional. This action was not taken hastily, nor was it taken without full consideration of the issues involved and the consequences.

At issue in this matter is whether the citizens of this country in establishing their government and electing their representatives at various levels of government, intended those at any one level to interfere with or dictate to those at another level.

Specifically, we do not believe that the federal government has the constitutional authority to inject itself into employe matters which should be settled at the local level. Nor do we believe that the same standards of wages and hours and overtime compensation should prevail in every city in the United States. Substantial differences in work requirements exist now between various cities, and we seen no valid reason to standardize local work assignments along federal lines.

Case in point: Cape Girardeau over a period of many years developed a workable system for fire protection–one that was within their financial

capabilities and yet allowed for a fire department staffed entirely of professional fire fighters and not dependent upon volunteers for manpower as are a great many departments.

Under this system, the Cape Girardeau Fire Department achieved a degree of professional efficiency second to none. The city takes a great pride in its fire department: available evidence indicates also a great personal pride in their work on the part of individual firemen. Long tenure in employment by many firemen suggests satisfaction with their conditions of employment.

This has all been accomplished at the local level, without help or hindrance from other levels of government. However, now the federal government is injecting itself into purely local government in this instance, as well as others. We think that financial consequences of such regulation will create great fiscal problems for many cities.

In Cape Girardeau, the fire department budget alone, now at about $350,000 annually, would increase by up to $400,000 annually if the present level of service were maintained by existing personnel. By hiring additional employes and eliminating overtime, the cost could be brought down to where the increase would be about $250,000.

Based on the present assessed valuation of property in Cape Girardeau, this increase would be a minimum of 40 cents per $100 assessed valuation per year; this compares to our existing general revenue tax levy of 50 cents. To send our tax levy from 50 cent to 90 cents would be a drastic change for the taxpayers of this city.

Many cities faced with such massive increase in costs will consider the alternate course of reduction in level of service, and herein lies a real threat to cities such as ours—that because of increased costs artificially generated by federal bureaucracy, our local government services might be reduced. For instance, a city government could decide to get by with fewer firemen on duty and depend upon securing additional manpower by calling out off-duty personnel. Obviously this would be much less desirable than our present system.

Another system being seriously considered by quite a few cities is that of creating a category of employes known as "public safety officers" who would have duties as both policemen and firemen as the need developed. This would result in monetary savings, but not in strict professionalism, and would not meet with enthusiasm from either policemen or firemen.

Any of these radical adjustments are totally unneces- if the federal government will only stay out of the regulation of local government, and allow each unit of local government to determine the level of service necessary to meet the needs of their particular citizens, balanced against the willingness of such citizens to provide the necessary taxes for the support of such services.

The contention of some in federal government is that cities are subject to federal regulation because they engage in interstate commerce, due to their purchase of supplies manufactured in other states. This reasoning is absurd, and if followed to its logical conclusion would place everyone in this country in interstate commerce. Every person reading this newspaper would be engaged in interstate commerce by the purchase of the paper,

because the paper on which it is printed was produced outside the State of Missouri.

Cities are not engaged in commerce, interstate or otherwise. Nor do we need federal regulation of municipal employment. Leave us to our own destiny, and let us continue our existing services.

Defendant's Exhibit No. 9

December 11, 1974

MEMORANDUM

TO: City Attorney
FROM: W. G. Lawley, City Manager
SUBJECT: IMPACT OF FLSA ON FRINGE BENEFIT COST

You recently inquired about the effect FLSA might have on the cost of employee fringe benefits should the city be required to comply. All those fringe benefits the cost of which varies in direct relationship to payroll dollars will increase proportionately as employee pay increases because of FLSA applications. Included in this category of benefits are social security, workmen's compensation insurance, retirement program, sick leave, vacation, and pay for holidays worked. On the average, fringe benefits cost the City now about 28% of payroll and in the case of departments having lower retirement ages, namely the fire and police departments, fringe benefits cost about 30 percent for the Police Department

and 35 percent for the Fire Department. If you need additional information on this subject please let me know.

I have included fringe cost in the summary of cost increases which might be expected under various alternatives available to the City should it be necessary to apply FLSA to our employees.

December 10, 1974

MEMORANDUM

TO: Thomas M. Utterback, City Attorney
FROM: W. G. Lawley, City Manager
SUBJECT: FLSA '74

The Fire Department is presently not in compliance with FLSA in that the Department's work week is not changed since the law first became effective, May 1; and the starting salary of $500 is $93.00 less than the starting salary per month computed at $1.90 per hour for a 72 hour duty week. After January 1, 1975, we will be out of compliance in a similar fashion in that the minimum rate of $2.00 per hour applied to the new 60 hour week – considering present circumstances wherein the Fire Department utilizes a 72 hour duty week, resulting in 16 on-duty personnel in addition to the Chief, the Inspector, and the Mechanic – will result in a minimum salary of $520, which is still $20 greater than the current starting rate of $500.

We have five major methods of complying with the FLSA:

1. Employ additional fire fighters, to maintain existing on-duty strength.

2. Retain the existing number of employees, reduce the duty week and make overtime payments to maintain on-duty strength.

3. Keep the same number of personnel but reduce duty week and reduce on-duty strength in lieu of making overtime payments.

4. Utilize an entirely or partially reserve (volunteer) unit.

5. Combine the police and fire departments to create a public safety department and cross-train policemen and firemen to perform both functions.

Of these, the first three have been reviewed in detail, the 4th has received only cursory attention, and the 5th, because of the nature of the change, would involve lengthy study.

Consideration of items 1 and 2 is based on the premise that FLSA requirements are that by 1977 a minimum duty week of 54 hours must be established and that in the following year the work week will be based on national averages. A recent survey indicates a national average duty week of 51 hours in cities polled by the International City Management Association. It appears reasonable to assume that – should all cities now using greater schedules reduce duty weeks to 54 hours by 1977 – the national average schedule would then drop to at least 48 hours per week.

To implement a 54 hour duty week and maintain existing strength levels would require 12 additional firefighters at an annual cost in 1977 of about $141,000.

To establish a 48 hour duty week would require a total of 19 additional employees from 1974 levels at an annual cost of $223,000.

To retain a 72 hour work week and pay overtime to maintain existing on duty strength would require annual overtime payments of about $340,000 by 1978. Should the average work week be reduced to 48 hours, the annual overtime payment would then be about $427,000.

The data given above for overtime payments and starting pay levels does not include the cost of compensating raises in departments other than the fire department so that all other employees would receive equal increases. The 72 hour duty week for firemen would result in approximately $306 per month average increase in fire salaries across the board to maintain parity. Extending a similar raise to non-fire departments would increase cost by an additional $964,000 annually.

Should staffing remain at 42 fire employees and on duty hours be reduced without expanding the number of men then the number of on duty personnel would decrease. A 54 hour duty week with 42 employees would result in a decrease from on duty strength of 15.4 to 11.6 after allowing 3 week's vacation and 1 week sick leave for all employees in the fire department. This reduction would allow the City to maintain 2 substations with 3 men on duty and 5.6 men, which translates to 5 or 6 men, on duty at the central station each day.

Should the duty week further reduce to 48 hours at a 42 staffing level, the on-duty strength would decrease from 15.4 to 10.3. This would result in operating 1 substation with 3 employees on duty and a central station with 7.3 employees on duty or would allow maintaining 2 substations with 2 men on duty at each plus maintaining the central station with 6.3 duty officers.

The City currently operates 3 substations with 3 men on duty at all times plus the central station with 6.4 men on duty. Because sick leave taken ordinarily averages less than 1 week per year per man, the City is ordinarily able to have at least 16 men on duty in addition to the Fire Chief, the Inspector and the Mechanic.

Cost data is not yet available for the 4th and 5th alternative courses of action; however, it is apparent that implementing either would result in a major change in local conditions as a result of legislation enacted by persons who are not experienced, not qualified, and otherwise without knowledge for making such decisions and as a result of regulations by agencies with similar expertise.

The Police Department would not be affected by implementation of FLSA standards with the possible exception of application of regulations to the police reserve unit. Promulgated regulations are unclear, but it seems likely that as now operated the reserve unit would not be affected until regulations are changed by FLSA Administrators; i.e., the Department of Labor.

The major impact of record-keeping requirements of FLSA, as I understand them, would be the necessity to change the method of reporting hours worked in the various departments and then centralizing detailed records of hours worked and paid. Presently much information is kept at department levels with only summary data reported to the central office for the purpose of computing payroll. The present system works to the benefit of employees to make sure they are properly paid within existing city payroll [page missing] clerical and other salary levels are conducted to insure that city salaries are competitive. In addition, it is the

City's policy to establish its lowest pay scale for the least demanding position at or near the federal minimum wage existing at the time salary scales are reviewed with the result that all city salaries are equal to or exceed federal minimum scales. In fact, when basic salary levels were last established, in 1970, base pay for the lowest paid position was scaled at $1.80 per hour compared to the then existing minimum wage of $1.60 per hour. All city employees other than college students, and similar temporary or part time employees are well above the federal minimum level of $1.90 to $2.30. An exception exists under recently promulgated rules, which require that the minimum wage be applied to sleep and meal time of firemen and not just to on-duty hours. This causes starting fireman pay to be less than $1.90 per hour. Presently, firemen and police employees earn salaries equivalent to and in most cases greater than those of teachers in the local public school system. When the value of fringe benefits is added, the pay scales of fire and police personnel are clearly superior.

ADDITIONAL INFORMATION:

Fringe benefits are:

1. a. Social Security Benefits
   b. Workman's Compensation Insurance
   c. Group Medical and hospital including major medical – Employee at City cost. Dependents at employee cost.
   d. Retirement plan
      - employee cost, 4% pay;
      - City picks up balance.
      - Benefits = 1% of high 5 year average salary per year of service + duty death, duty disability and other features. (On Retirement)

e. Sick leave
   – accumulative at 1 day per month up to 90 work days.
f. Vacation
   – accumulative at 1 – 1 1/2 days per month – 24 day maximum accumulative
g. 9 holidays.
h. Guaranteed annual wage policy, i.e., no layoff because of weather, etc.

2. FIRE RUN DATA

	No. Of Runs		Time On Fire Runs			Man-Hours On Fire Runs	
Year	Annual	Per Week	Annual	Min. Per Run	% of Avail. Hrs. Per Run**	Annual	Aver. Hrs. Per Man Per Year
73	389	7.5	318:09	44	3.6	1537:11	36.6
72	398	7.7	213:19	32	2.4	1286:57	36.8
71	451	8.7	NA*	–	–	1477:30	42.2
70	434	8.3	NA*	–	–	1368:20	39.1
69	336	6.5	202:18	36	2.3	NA*	–
68	353	6.8	171:13	29	2.0	NA*	–
67	307	5.9	160:05	31	1.8	NA*	–
66	344	6.6	186:27	33	2.1	NA*	–
65	295	5.7	169:46	35	1.9	NA*	–
64	390	7.5	227:30	35	2.6	NA*	–

*change in report
**25 hours/day x 365 days = 8,760 available hours.

3. Police overtime cost is expected to increase by about $8,000 per year because of pay at rate of 1 1/2 for hours over 40 per week, compared to previous practice of paying straight hourly rate for overtime hours worked.

Defendant's Exhibit No. 10

SALT LAKE CITY CORPORATION
LAW DEPARTMENT
101 CITY & COUNTY BUILDING
SALT LAKE CITY, UTAH 84111

October 23, 1974

Mr. Charles S. Rhyne
General Counsel
National Institute of Municipal
Law Officers
839-17th Street, N.W.
Washington, D.C. 20006

RE: Fair Labor Standards Act

Dear Mr. Rhyne:

Thank you for your inquiry dated October 15, 1974, concerning the adverse effects of the Fair Labor Standards Act on Salt Lake City government. Our personnel director, Lynn J. Marsh, has outlined in some detail the affect of this amendment on Salt Lake City operations. I have attached a copy of his evaluation for your records.

However, with specific reference to your inquiry concerning compensatory time off, I can state that the Federal requirements are met with great dismay by the City. As you are aware, Salt Lake City is located in the mountains at approximately 5000 feet elevation. In the winter months, commencing the latter part of October and often continuing through April, we receive copious amounts of snow. The snow must be plowed from our streets and salt applied to enable traffic to operate. In the past, the City has utilized street department employees to perform this service during the winter months; these employees often work long overtime hours and are on call 24 hours a day during this hazardous season. They have been given the option to accept compensatory time off on the basis of one and one-half hours off for each overtime hour worked or to receive time and one-half overtime pay. By far the vast majority of the workers have chosen to take compensatory time off during the summer months.

You will note from Mr. Marsh's correspondence, that it is estimated that the cost of overtime payments for the City would approach $500,000.00, a sum, I might add, the City does not presently have. Further, it is a procedure which is not desired by the majority of city employees; but is rammed down our throats by Federal fiat for reasons apparently known only to big labor and the Washington social planners.

You will also note the other areas of the Act which will have impact on the city. It would appear that the City will definitely be unable to hire the number of young people it has in the past years because of the increased salary which must be paid to these young people. We feel this high pay to be a strong detriment to

our community because: (a) we can see no need to pay the high salaries to our young people, which is entirely out of phase with what has been standard pay for teen age employment; and (b) it will substantially reduce the number of employment opportunities available to these young people. We fear they will be left idle with the potential of substantially increasing our juvenile delinquency and prank problems.

I trust the foregoing will be of some assistance to you in your case preparation. If I can be of any further aid, please advise.

Sincerely,

/s/ Roger
ROGER F. CUTLER
City Attorney

Defendant's Exhibit No. 11

SALT LAKE CITY CORPORATION
PERSONNEL DEPARTMENT
503 CITY & COUNTY BUILDING
SALT LAKE CITY, UTAH 84111

September 18, 1974

Mr. Allen E. Pritchard, Jr.
Executive Vice President
National League of Cities
1620 Eye Street, N.W.
Washington, D.C. 20006

SUBJECT: Fair Labor Standards Act

Dear Mr. Pritchard:

In response to your letter of August 22, 1974, the following information regarding the Fair Labor Standards Act Amendments, and the impact upon Salt Lake City, is submitted to assist the National League of Cities in their contemplated litigation.

Compensatory time off is probably the number one problem Salt Lake City has with the Fair Labor Standards Act Amendments at this time. However, new scheduling in both the Police and Fire Departments could also be a major problem under the new law. Prior to the adoption of the Amendments to this act, we permitted department heads the option of allowing compensatory time off in lieu of paying time and one-half overtime pay. Our employees appreciated this option, and the majority

took the time off. Last year in our Department of Streets and Public Improvements alone, employees accumulated 7,000 hours of overtime in snow removal. The majority of this time was utilized as compensatory time off.

This new law has forced us to amend our city ordinances. We have eliminated an ordinance which provided for overtime pay after eight hours per day or after 40 hours per week. The ordinance now provides for overtime premium pay only after 40 hours per week. This allows some flexibility in giving compensatory time off during the week, and in adjusting schedules. At the same time, we are giving at least 24-hours notice to the employee, whenever possible, when we must adjust his work schedule. The week following overtime worked, a cash payment must be made. Many employees are disgruntled with this new law because they can no longer trade shifts or build up comp time for use at a later date. It has created a serious morale problem, and I am sure has cost considerable loss in productivity.

Scheduling: We have established work weeks now throughout Salt Lake City, and have had to change many schedules for employees involved in 24-hour operations. Some of our old schedules were back to back, permitting employees longer periods of time off than what we can now permit under the new law.

Volunteers: School Crossing Guards were formerly paid $135.00 per month. Effective May 1, 1974 we increased their salary to $150.00 per month to meet the new minimum wage requirement of $1.90 per hour. They work approximately 2-1/2 to 3 hours per day during the months when school is in session.

Seasonal Peaks and Valleys: In our Department of Parks and Public Property, the minimum wage was raised from $1.25 per hour for summer students, to $1.90 per hour because the students rotate from one park to another cutting grass and trimming. No student exemption was allowed because of the rotation. Salt Lake City hires approximately 300 students during the summer months, which necessitated a sizeable increase in next year's budget. We did receive an exemption from both the minimum wage and overtime provisions for our cemetery, inasmuch as the Department of Labor classified it as a retail establishment with net earnings under $250,000.00 per year.

I mentioned previously our road maintenance and snow removal problems, and the serious impact this will have on Salt Lake City. After a careful review of our budget problems, and consideration of the impact of the Fair Labor Standards Act, we are cutting back 100 employees by attrition. Beginning October 1, 1974, we will not replace terminating employees unless the new hires receive special approval by the Personnel Director, City Auditor, and Board of City Commissioners.

Training: In the past, we have utilized interns from the University of Utah, and have paid them less than the minimum wage. The new law has eliminated this, and now we must pay them $1.90 per hour. The internship programs are beneficial to the students, inasmuch as they receive course credit, as well as to the City, which benefits from their education and enthusiasm.

Incentives: We do have an incentive system, wherein refuse collectors are assigned a particular route. When they complete the route, they can go home. We have not looked at all the implications with regards to overtime

with this particular group as yet, but a recent legal opinion issued by our City Attorney's Office indicates that we would have to pay them overtime when a holiday falls during the week, because our ordinances state that "All holidays shall be considered as days worked in the computation of overtime."

Compensatory Time: As I explained earlier, this is our biggest problem area. It appears at this point that additional overtime will be necessary to pay for former comp time, as it will be impossible to follow the Fair Labor Standards Act and not pay time and one-half premium pay. This will result in greatly increased overtime cost to the City. It would be impossible to give you an accurate figure at this time, but I estimate the cost to be near $500,000.00 per year. It will also result in a diminuation of service in several areas to pay the overtime, even at this rate.

Joint Employment: At present, this has not resulted in a serious problem. However, after January 1 when the overtime provisions apply to the Police and Fire Departments, we could have a serious problem, as many police personnel serve as special security officers at the Salt Lake City International Airport, at $5.00 per hour. When an officer works his regular shift, then puts in over 20 hours per week at the airport, we will be in an overtime situation. Each year the reduction in hours will create higher overtime payments. We had been considering a constant manning in the Fire Department effective July 1, 1974, but dropped the idea when the Fair Labor Standards Act was passed, until we can get a clarification of "Tour of Duty," "Sleep Time," "Meal Periods," etc.

Social Services: Under our Comprehensive Employment and Training Act (CETA), it was necessary to pay all the disadvantaged students $2.00 per hour in accordance with a Department of Labor directive, inasmuch as these programs were previously covered by the 1967 provisions of the Act. This created an inequity for those who are not disadvantaged. Someone could file a suit for "Equal Pay for Equal Work," and win the same pay.

Leave: Our ordinance allows only time worked in the event of a holiday, not sick leave, vacation, etc. This could create a problem on holidays, however, in the computation of wage-hour overtime.

Changing Pay from Annual or Monthly to Hourly: We are considering changing our pay periods to a bi-weekly schedule, effective January 1, 1975, in order to more closely relate the computer to work weeks. We are also giving consideration to changing operations and maintenance employees to an hourly salary for simplification of payroll reporting. However, this could create a serious morale problem with employees, and we want to study it very carefully before making a decision.

Police and Fire: Our main concern at this time is what effect the new guidelines will have on hours worked in the Police and Fire Service when the hours in the Fire Service are reduced below our present 56 hours per week, as in 1977 to 54 hours per week. This will start costing us more money, and if it ever hits 40 hours, it will cost an estimated $3,000,000.00 per year. Trading of shifts will be another problem.

We now pay an employee who must appear in court on his day off two hours for a misdemeanor and four hours for a felony. If this results in overtime pay, it will be

costly. Training time could also have a serious effect. Educational incentive pay, if figured into the base salary, could result in thousands of dollars each month.

Health Maintenance Programs: As I understand this, if we have a Health Maintenance Organization in operation in our area, we must give them first opportunity to bid on our health and accident insurance plan under the Fair Labor Standards Act requirements.

Age Discrimination: The protective group between the ages of 40 and 65 is creating serious problems in our Police and Fire Department requirements. Heretofore, they have limited these particular occupations to 21 through 29 years of age. The Civil Service Commission is presently reviewing these requirements for possible change, but it looks as if some serious modification will have to take place.

This law has created more morale problems for City employees than any law passed in the eight years in which I have been Personnel Director for Salt Lake City. The employees blame Salt Lake City for the law, and not the Federal Government.

If you need additional information, please do not hesitate to call on us.

Yours truly,

/s/ Lynn J. Marsh
LYNN J. MARSH
Personnel Director

Defendant's Exhibit No. 12

DEPARTMENT OF LAW
OFFICE OF THE
ATTORNEY GENERAL
STATE CAPITOL
PHOENIX, ARIZONA 85007

December 4, 1974

Mr. Bacigalupo
Rhyne & Rhyne
400 Hill Building
Washington, D.C. 20006

Dear Mr. Bacigalupo:

This is to confirm my telephone conversation with you of November 26 regarding the data which I gave you on the financial impact that the Fair Labor Standards Act is having on the State of Arizona.

Based on budget requests for the 1975-76 fiscal year, the State of Arizona will be required to spend an additional $2,000,000 for overtime salary payment which was not authorized under state budget restrictions prior to the 1974 FLSA amendments. In addition to this amount, employee related expenses are approximately $300,000. This amount does not include the additional amounts which are required to be spent for the extra half-time on highway construction overtime. Based on our 1974-75 expenditures through October, we project that the financial impact on additional highway construction overtime will be $250,000, including

employee related expenses. This brings our estimate of the impact of the FLSA on the State of Arizona to a total sum of $2,550,000 per year.

As I indicated to you, this does not include the impact which the amendments will have on the various counties and cities. I have requested that the League of Cities and Towns and Associated County Governments provide me with impact data for their member subdivisions. As soon as it is provided to me, I will transmit it to you.

If you have any further questions or I can be of any further assistance to you in this matter, please contact me.

Very truly yours,

N. WARNER LEE
The Attorney General

/s/ Peter C. Gulatto
PETER C. GULATTO
Assistant Attorney General

Defendant's Exhibit No. 13

November 25, 1974

MEMO TO: Rick J. Bacigalupo, Rhyne & Rhyne, 400 Hill Building, Washington, D. C. 20006

FROM: Battalion Chief Michael T. Mitchell, Commander, Planning Section, Los Angeles City Fire Department

SUBJECT: FAIR LABOR STANDARDS ACT LAW SUIT

Listed below are responses to questions set forth in Mr. Rhyne's letter to Mr. Carpenter, dated October 11, 1974.

1. Uniformed Fire and Police Personnel – 1974-75 Budget

Police – 7,389
Fire – 2,996

2. 1974-75 Budget – Estimated Salary Expenditures

Police – $133,396,833
Fire – $ 63,886,805

3. Estimated increase in cost for FLSA – *Fire* – Fiscal Year 1975-76

Estimated $2,590,454

plus an additional expense to the City for pension costs which would not appear on the Fire Department's Budget

Low estimate of $160,070 to a
high estimate of $432,624

depending upon the accounting system used to compile the figures.

The cost would increase over the years as maximum hours decrease pursuant to the FLSA.

Police Department

The Police Department estimates no immediate increase in salary accounts due to the FLSA. This is based on their proposal to use the difference in hours between 160 hours to 240 hours in a 28-day period (deployment) as compensatory time to offset overtime.

However, in 1978, if the Police Department is required to go to a 40-hour week or 160 hours in a 28-day period, estimated overtime costs would be somewhere between 4 to 6 million dollars annually.

4. Increased cost to the Fire Department would come about as a result of paying time and one half overtime for some overtime, and hiring 122 additional uniformed personnel for vacation and sick relief time to minimize the time and one half impact.

Police Department overtime estimate for 1978 would come about due to paying time and one half for hours worked over the 160 hours maximum.

5. The increased cost will not produce lesser service; but, on the other hand, it will not increase service, i.e., it will merely maintain the status quo.

Another possibility is that additional funds to meet these additional financial obligations might not be approved in future budgets due to a shortage of revenue or other allocations of available resources. Lack of sufficient funds to handle the overtime liability would then result in a reduction in manning in both the Fire and Police Departments, with a resulting reduction in service.

MICHAEL T. MITCHELL
Commander
Planning Section

Defendant's Exhibit No. 14

CITY OF SACRAMENTO

November 22, 1974

Mr. Charles S. Rhyne
Rhyne and Rhyne
Attorneys at Law
839 – 17th Street, N.W.
Washington, D. C. 20006

Dear Mr. Rhyne:

As requested by Mr. Richard Carpenter, General Counsel, League of California Cities, and as I discussed with Mr. Bacicalupo in Washington on November 18, this letter is to provide a statement of the impact of the Fair Labor Standards Act on the City of Sacramento Fire Department and Police Department.

The Fair Labor Standards Act was signed by President Nixon on April 8, 1974, with effective date of May 1, 1974, for all provisions of the Act except those relating to police and fire overtime under Section 7(k) and Section 13(b) (20) regarding police and fire departments. As a member of the National League of Cities' Task Force, I had the advantage of being familiar with the provisions of the Act which enabled my city, unlike most, to take some action prior to the effective date on May 1, 1974, which would mitigate certain problems caused by the new law.

On April 25, 1974, the Sacramento City Council passed City Ordinance No. 3395, Fourth Series (copy

enclosed), which contained several provisions necessary to anticipate the effective date of the Fair Labor Standards Act:

1. To raise the pay rates of three part-time classifications to comply with minimum wage provisions of the law;

2. To amend the definition of management employees to more closely fit the identification of professional, administrative and executive exemptions under Part 541 of the Code of Federal Regulations (29 CFR 541) by amending Section 2.98 of the Sacramento City Code;

3. To repeal Section 2.108 of the Sacramento City Code on overtime compensation which provided for the payment of overtime to employees at one and one-half times the applicable hourly rate or the allowance of time off at time and one-half for compensatory time. (A copy of the repealed Section 2.108 is enclosed.) The repeal of the City's Code section on overtime was deemed not to affect overtime provisions negotiated under a memorandum of understanding with a recognized employee organization.

The previous overtime policy of the City of Sacramento, as expressed in the repealed Section 2.108, permitted the granting of compensatory time off or time and one-half pay for any work performed in excess of the regular daily work shift or for any work performed on scheduled days off, except for sworn police officers and uniformed firefighters assigned to fire suppression. The City's overtime policy had been developed over the course of many years and was well liked by employees and City management alike. The sudden cut-off of the compensatory time usage for employees, other than police officers and firefighters, is estimated to have

resulted in additional costs in the current 1974-75 budget approximating at least $350,000. The City's prior policy of paying overtime on a daily basis is now more restrictive under the Fair Labor Standards Act requirement to compute overtime on a work-period (work week) basis. Where this had not been a hardship on the City when compensatory time off was available, the sudden imposition of overtime at time and one-half pay on a weekly and daily basis has been. It has required many significant changes in scheduling of hours in many City operations.

In the Sacramento Zoo, for example, the scheduling of hours previously had been on a nine-day cycle in which the employees would be scheduled to work six consecutive days and be off three. To avoid the unnecessary overtime payments imposed by the Fair Labor Standards Act, it has been necessary to adopt a work assignment schedule which is less desirable both to the employees and to the Zoo management, as follows:

OOXXXXX
XXOOXXX

Under the new schedule, the Zoo employee actually works seven consecutive days, but, as these include five days back-to-back with two days in the succeeding work week, this is permissible under the law. It is difficult to write about the effect and the impact of the Fair Labor Standards Act on the Police Department and the Fire Department operations as we still do not know at this late date what the federal regulations will be with regard to overtime. The Department of Labor, on November 1, 1974, issued a proposed new regulation, 29 CFR 553. It

is not known when the final regulation will be issued. The Department of Labor held hearings commencing November 18 and has held open the record until December 2, therefore, the earliest date at which time the final regulation will be issued will be December 3, 1974. As the effective date of the overtime provisions of the Fair Labor Standards Act under Section 7(k) will be January 1, 1975, cities, counties and other public agencies throughout the United States are placed, again, in the extremely difficult position of guessing as to what the law will be while being subject to the full penalties of the law.

At this time, the Sacramento Fire Department has 441 fire suppression personnel. The approximate annual salary expenditure for these 441 positions is $8,275,000. Sacramento fire suppression personnel are assigned to be on duty for 24-hour fire duty periods which commence at 8:00 a.m. and end at 8:00 a.m. the following day. During a tour of duty a Sacramento firefighter is scheduled to perform about six hours of work-related activities and to be on standby for the remaining 18 hours. Throughout the entire 24-hour tour of duty, a Sacramento fire suppression employee is on call to respond to any alarm.

The fire duty cycle of the Sacramento Fire Department at present consists of a 12-day cycle in which the employee is scheduled to be on duty four 24-hour periods in every 12 days and eight 24-hour periods off duty:

XOXOOXOXOOOO

X = 24-hour scheduled tour of duty.
O = 24 hours off duty.

A Sacramento firefighter assigned to fire suppression has a gross annual schedule of 3,049 hours. From the gross schedule hours are subtracted 129 hours for 11 holidays, leaving a net schedule to be performed of 2,920 hours of duty per year. Therefore, a Sacramento firefighter is scheduled to be on duty 121.67 twenty-four hour shifts per year on the average. With vacation and sick leave taken out, a Sacramento firefighter, on the average, is on duty 111 twenty-four hour periods per year.

At this time, the Sacramento Fire Department staffs to man, on a continuous basis, 147 positions at various fire houses located throughout the City. An enclosure detailing the numbers of positions which are manned on a continuous, fixed postmanning basis is enclosed.

We presently have a Memorandum of Understanding negotiated with Local 522, IAFF, which will expire June 30, 1975. We will be required to negotiate in the spring of 1975 with the firefighters regarding wages and hours and other terms and conditions of employment for the fiscal year 1975-76 and possibly for a longer term agreement. It will be necessary, in our negotiations with the firefighters, to negotiate conditions where we do not yet know what the law will be. For example, on January 1, 1978, a new regulation will come into effect through the determination of the Secretary of Labor which will identify that we will be required to pay overtime over 54 hours or less for firefighters. The number of hours over which overtime will be required is to be based upon a survey made in 1976 by the Department of Labor of fire hours in effect in 1975. The method of the survey to be conducted and the interpretation of the results by the Secretary of Labor are unknown at this time. It is entirely possible that the Secretary of Labor could

determine that the hours over which overtime must be paid firefighters commencing January 1, 1978, might be 48 hours. It is possible that we may wish to enter into a three-year agreement with the firefighters next spring. If we do, we must speculate as to what the new overtime regulations will be and act accordingly in determining our negotiating position.

At this time, for the Fire Department, we are attempting to determine the work period which the City of Sacramento will declare for "employees engaged in fire protection activities." Section 7(k) of the Act provides that we have the option of declaring a work period of from seven to 28 days. Section 7(k) requires payment of overtime at time and one-half for hours worked over 60 within the work period on a seven-day basis; over 240 hours for a 28-day work period; or any proportionate number of hours to days. Each of these alternatives presents significant difficulties.

We are also conscious of the fact that, starting January 1, 1976, the number of hours will decline to 58 per week over which overtime must be paid and to 54 per week commencing January 1, 1977. We know definitely that we will need to change the fire duty cycle and possibly the work period declaration commencing January 1, 1977. At that time, it would be necessary, in order to achieve a 54-hour duty schedule, to place firefighters assigned to fire suppression on a 28-day fire duty cycle in which nine 24-hour periods would be scheduled, which is a change from the existing twelve-day cycle. To do otherwise would result in unnecessary fire overtime costs.

In the remaining days of 1974, if the City of Sacramento declares a work period of 12 days or 24 days, in order to schedule the same number of fire duty hours

within each work period, the work periods will not coincide in any convenient manner with the pay period, presenting other kinds of administrative problems.

Looking ahead to January 1, 1977, if the City of Sacramento will continue to provide the same level of fire protection service as it now does, it will be necessary, in order to avoid unnecessary time and one-half overtime payment to firefighters, to reduce the average hours on duty per week from the present 58.6 gross/56 net to a net scheduled hours of 54 hours per week. This would result in additional costs of about $310,000 in fire protection, requiring the employment of an additional 16 or 17 firefighters, or the reduction in fire protection service of a like amount. As in all likelihood, salaries in 1977 will have increased, the $310,000 cost to move to a 54-hour average week is very conservative.

Commencing January 1, 1978, if the Secretary of Labor would require that overtime be paid firefighters at the rate of time and one-half over an average of 52 hours per week, the estimated cost would be $636,000; over an average of 50 hours per week, $993,000; and over an average of 48 hours per week, $1,379,000. Again, as all of the calculations are based upon present salary rates and present staffing patterns, these estimates are conservative.

Prior to May 1, 1974, civilian fire dispatcher clerks in the Fire Department were employed on a rotating schedule which changed every six days. The City of Sacramento gambled that the definition of "employees engaged in fire protection activities" would not include civilian dispatchers at the Fire Department and, therefore, would be required to be placed on a seven-day work week for purpose of computation of overtime and

be required to be paid time and one-half over 40 hours within the work week. This decision reached in late April 1974 required the very sudden reassignment of civilian dispatchers in the Fire Department from their long-established traditional work schedule to a new schedule designed to accommodate the seven-day work period. As in the case of the zoo attendants, neither the civilian fire dispatchers nor the Fire Department management feel that the changes required by the Fair Labor Standards Act in scheduline have enhanced Fire Department dispatching operations. Further, the loss of compensatoıy time off for overtime has complicated the scheduling of the civilian fire dispatchers.

With regard to the Police Department, the greatest impact that the Fair Labor Standards Act has had so far has been that compensatory time off no longer may be utilized. At this time, the Sacramento Police Department has a policy of paying time and one-half for police officers who work over 40 hours per week and time and one-half over a regular work shift, which, for most police officers, is eight hours. (A few City employees are assigned to a four-day, ten-hour work shift, in which case they are paid time and one-half over ten hours.)

It will be necessary to declare a work period pursuant to Section 7(k) for employees engaged in law enforcement activities within the Sacramento Police Department. This decision has not yet been made. Probably, the decision will be to declare a work period of 28 days in order to obtain the utility afforded by the four-week work period. One disadvantage of a 28-day work period for police employees will be the postponement of payment of overtime bi-weekly to payment of overtime every second pay period if this option is selected.

We now face the problem of determining for both the Police Department and the Fire Department which positions are subject to the Act and which positions under Part 541 are entitled to the administrative, professional or executive exemption. At the November 18, 1974, Department of Labor hearing on 29 CFR 553, in representing the National League of Cities and other public interest groups, I stated that the understanding which we had was that the proposed identification of titles in Section 553.3(a) and 553.4(a) were not intended to abrogate or modify the provisions of Part 541. Department of Labor panel members, in the question-and-answer period following my testimony, indicated that our interpretation is correct and that the regular tests for determination of administrative, professional and executive exemptions are not affected by the proposed language in 553.3(a) or 553.4(a). Therefore, we now can begin to attempt to identify which positions and which ranks are entitled to be excluded from the Act. This work has not yet been completed. We do not yet know whether our first-line supervisors of Fire Captain or Police Sergeant will be exempted or not exempted from the provisions of the Act. This determination will affect operations of the Police Department in particular and to a lesser degree the Fire Department.

The proposed Section 553.8 relating to joint employment, together with the provisions set forth in 29 CFR Part 791, present many problems for the Sacramento Police Department and also for the Fire Department. It has been the practice of the Sacramento Police Department to permit, under certain conditions, police officers to work for other public or private

employers to perform law enforcement duties. The previous and proposed requirements relating to joint employment have substantial impact on the outside employment procedures of both the Police and Fire Departments and will require substantial revision and curtailment of outside employment. It is particularly difficult in the Police Department and the Fire Department to make estimates of this kind when the change in overtime policy in the final year of 1978 cannot be known until, probably, September or October 1977.

It is almost certain that the Secretary of Labor, effective January 1, 1978, will require time and one-half over 40 hours for law enforcement personnel. It seems likely that the Secretary of Labor may require time and one-half over a number of hours fewer than 54 for firefighters.

With the many unknowns, it becomes necessary for the City of Sacramento to give serious consideration to substantial change in the form of fire suppression activities, including the abandonment of the long-standing 24-hour fire duty period (which includes eight hours of sleeping time and at least three hours of meal time) to be replaced by an eight-hour work day in which sleeping time would not be permitted and meal time would be substantially restricted.

The whole concept of the Fair Labor Standards Act is directed at paying covered employees on an hourly-rate basis. At this time, almost all City of Sacramento employees, including all police and fire employees, are paid on a bi-weekly basis.

The Act will force the conversion of all employees covered, within a relatively short period of time, from a

salaried bi-weekly basis to an hourly-rate basis. One effect this could have on fire suppression personnel who would work varying numbers of hours within a work period would be a variation in amounts of money per pay check.

I regret that it is not possible to be more definitive and specific concerning the total financial impact and effect on City services that this Act has caused will cause. I believe that, probably, it will take us another year to fully understand and appreciate all of the costs and problems that the mandate of the Fair Labor Standards Act has imposed.

Sincerely yours,

/s/ William F. Danielson
William F. Danielson
Director of Personnel

Enclosures:
City of Sacramento
Ordinance No. 3395, Fourth Series.
Sacramento Fire Department
Fire Suppression Staffing Assignment.
Repealed Section 2.108,
Overtime compensation.

Sacramento City Ordinance
No. 3395 – Fourth Series

ORDINANCE NO. 3395 FOURTH SERIES

An Ordinance Amending Division 2 of Article VI of Chapter 2 of the City Code
Relating To Rates of Salary and Hours of Work and Declaring Said Ordinance To Be An Emergency Measure To Take Effect May 1, 1974.

BE IT ENACTED BY THE COUNCIL OF THE CITY OF SACRAMENTO:

SECTION 1.

Section 2.91 of Chapter 2 of the Sacramento City Code is amended by adjusting the salaries of cashier, locker attendant and public service aide to read as follows:

Code No.	Class Title	Pay Per Hour		
25110	Cashier	$2.08	$2.18	$2.29
25050	Locker Attendant	$2.03	$2.13	$2.24
25068	Public Service Aide		$2.01	$2.11

SECTION 2.

Section 2.98 of the Sacramento City Code is hereby amended to read as follows:

Sec. 2.98. Provisions Inapplicable To Management Employees.

The provisions of this division relating to hours and days of employment shall not apply to persons defined

as "management" by the City's Employer-Employee Relations Policy, it being the intention of the city council that such persons shall devote as much time to their employment as may be necessary for the efficient operation of the city government.

SECTION 3.

Section 2.108 of the Sacramento City Code is hereby repealed.

SECTION 4.

The repeal of Section 2.108 of the Sacramento City Code shall not affect amy memorandum of understanding previously adopted by the Council, nor the right of any employee covered by a memorandum of understanding to continue to receive overtime as previously provided for in Section 2.108 and the memorandum of understanding covering the employee.

SECTION 5.

Section 2.111-3 of the Sacramento City Code is hereby repealed.

SECTION 6.

This ordinance is hereby declared to be an emergency measure to become effective May 1, 1974, in order that the changes contained herein become effective concurrent with the effective date of the Fair Labor Standard Act Amendments of 1974.

SECTION 7.

This ordinance shall be published once within ten days after enactment in the official newspaper of the City of Sacramento.

PASSED: April 25, 1974
EFFECTIVE: May 1, 1974

MICHAEL S. SANDS
Vice Mayor

ATTEST:
HUBERT F. ROGERS
Chief Deputy City Clerk

SACRAMENTO FIRE DEPARTMENT
FIRE SUPPRESSION STAFFING ASSIGNMENTS

Average number of positions manned per 24-hour duty period, using 441 fire suppression personnel, who average 111 twenty-four periods on duty per year

First Battalion	Positions
Battalion Fire Chief	1
#1 Engine Company	5
#2 Engine Company	5
#2 Truck Company	6
#3 Engine Company	6
#5 Engine Company	6
#5 Truck Company	6

#11 Engine Company	4
#13 Engine Company	4
#13 Truck Company	5
#16 Engine Company	4
#16 Truck Company	5
	57

Second Battalion	Positions
Battalion Fire Chief	1
#4 Engine Company	5
#4 Truck Company	5
#6 Engine Company	4
#6 Truck Company	5
#7 Engine Company	5
#8 Engine Company	4
#9 Engine Company	4
#10 Engine Company	5
#10 Truck Company	5
#12 Engine Company	4
#21 Engine Company	5
	52

Third Battalion	Positions
Battalion Fire Chief	1
#14 Engine Company	6
#15 Engine Company	4
#17 Engine Company	4

#17 Truck Company	5
#18 Engine Company	4
#19 Engine Company	4
#20 Engine Company	5
#20 Truck Company	5
	38

Average total fire suppression positions manned 24 hours per day:

First Battalion	57
Second Battalion	52
Third Battalion	38
	147

November 1974

Holiday	*Date*
Independence Day	July 4, but if it falls on Sunday, then the following Monday is a holiday.
Labor Day	First Monday in September.
Admission Day	September 9, but if it falls on Sunday, then the following Monday is a holiday.
Columbus Day	Second Monday in October.
Veterans' Day	Fourth Monday in October.
Thanksgiving Day	Fourth Thursday in November.
Christmas Day	December 25, but if it falls on Sunday, then the following Monday is a holiday.
Statewide Election Days	
Good Friday (4 hours)	Friday before Easter Sunday.

The provisions of this section shall apply to employees paid on a monthly salary and such employees shall receive full compensation for holidays on which they are not required to work. Compensation for employees paid on hourly rates shall be only for actual time worked and while on earned vacation, earned sick leave, or disability in line of duty. (Ord. No. 2339 (4th Series), § 2; Ord. No. 3021 (4th Series); Ord. No. 3154 (4th Series), § 1.)

Sec. 2.108. Overtime compensation.[4]

It shall be the policy of the city that overtime work is to be discouraged. However, in case of emergency or whenever the public interest demands, an employee may be required to perform overtime work by the department head or his authorized representative.

It shall be the policy of the city to compensate employees required to perform overtime work either by (1) pay at one and one-half times the applicable hourly rate, or by (2) allowance of time off from employment with pay on the basis of one and one-half hours off for each hour of overtime worked. Overtime work shall be defined as:

a. Any work performed in excess of a regular daily work shift;
b. Any work performed on scheduled days off; or
c. Any work performed on recognized holidays as designated in section 2.107 of this Code, except by employees regularly assigned to other than a five-day work week and safety member employees of the police department.

In any department where employees may be allowed to make up time lost through inclement weather, irregular operational hours or other reasons, and time is made up by working on regular scheduled time off, such make-up time shall not be considered overtime, and shall be credited to the employee on a straight time basis.

[4]For charter provisions as to hours of duty, see Char., § 166.
As to maximum hours of work per week for firemen, see § 15.3 of this code.

When time off from employment is allowed as compensation for overtime, such time off shall be granted within one year from the date overtime was performed, and at the convenience of the department head. Upon separation from service, any employee having unused time off to his credit as compensation for overtime shall receive cash compensation for such unused time off.

The determination of additional pay or time off for overtime compensation shall be made by the department head, with the approval of the city manager.

Each department or division head shall submit to the city manager for his approval an outline of the overtime policies to be followed in his department or division to carry out the intent of these overtime provisions. Once approved, no changes shall be made in any department overtime policy without the consent of the city manager.

Accurate records of all overtime performed shall be kept by each department or division, and periodical reports as may be requested shall be submitted to the city manager relating to authorized overtime. (Ord. No. 2737 (4th Series), § 4; Ord. No. 3155 (4th Series), § 1.)

Sec. 2.109. Night shift premium pay.

All employees of the City of Sacramento, excepting those herein excluded, who work five-eights or more of their regular shift in the

Defendant's Exhibit No. 15

CITY OF PASADENA
ONE HUNDRED NORTH GARFIELD AVENUE
PASADENA, CALIFORNIA 91109

December 13, 1974

Mr. William Rhyne
Rhyne and Rhyne
400 Hill Building
Washington, D.C. 20006

Re: Fair Labor Standards Act Litigation

Dr. Mr. Rhyne:

Pursuant to our conversation of November 25, 1974, I am confirming the information as follows:

1. As of July 1, 1974, the City of Pasadena employed 144 fire suppression personnel.

2. For the calendar years 1975 and 1976, no increase in costs are estimated. For the calendar year 1977, increased costs are expected, however, they have not been estimated at this time. For the calendar year 1978, the increased costs for fire suppression personnel may amount to as much as $1,477,000 per year depending on several variables.

3. The estimated increased costs of fire suppression personnel results if fire suppression personnel are to receive the same pay for approximately 42 hours (as they presently receive for 56 hours) plus 14 hours of overtime at a rate of time and one-half.

4. Although increased costs are estimated, we do not know if the service will increase or decrease. It is possible that the Fire Department budget will not be increased and therefore there will be a lesser level of service.

It was a pleasure talking with you last month and I hope the information which I have communicated is helpful.

Justice Tobriner gave an excellent discussion of the right of cities to establish the level of service in *Firefighters Union v. City of Vallejo*, 12 Cal. 3d 608, 116 Cal. Rptr. 507 (1974). For your information, I am enclosing the report of Vallejo City Attorney John Powers on that decision and a memorandum of points and authorities which discusses that decision.

I would like to review a copy of your complaint and supporting memorandum of points in the action challenging the Fair Labor Standards Act. If it is convenient, would you please send our office copies of those pleadings.

Very truly yours,

Wendell R. Thompson
City Attorney

/s/ James O. Kahan
James O. Kahan
Deputy City Attorney

Defendant's Exhibit No. 16

AFFIDAVIT OF EDWARD E. McCOMBS, CITY MANAGER, CITY OF SAN BUENAVENTURA, CALIFORNIA, STATING THE EFFECT OF THE 1974 AMENDMENTS TO THE FAIR LABOR STANDARDS ACT ON SAID CITY

STATE OF CALIFORNIA)
ss.
COUNTY OF VENTURA)

EDWARD E. McCOMBS, being first duly sworn, deposes and states:

1. I am the City Manager of the City of San Buenaventura, California, and have held such office continuously since March 1970. Previously, over an eleven year period, I have held equivalent offices in two other California cities.

2. As City Manager of San Buenaventura, under the provisions of its Charter, I am the administrative head of the City's government being directly responsible to the City Council for the management of the City's affairs, including the appointment and discharge of personnel in the City's fire and police departments and the preparation of the annual budget. In carrying out these duties, I have direct knowledge of present and future financial, service, and personnel requirements of the City, including the requirements of the City's fire and police departments.

3. I have read and am familiar with the content of the Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1974, which extends the Act's minimum wage, overtime, equal pay

and recordkeeping requirements to public agencies. With regard to those provisions that affect the computation of, and compensation for, overtime work performed by employees engaged in fire protection and law enforcement activities, I feel that their implementation will result in a pronounced and adverse financial impact upon the City of San Buenaventura.

4. The brunt of the impact will be felt by the City's fire department where personnel are currently scheduled on a calendar year basis, and where individuals work an average of 62.3 hours per each seven day work period. City staff has estimated the increased costs that must be borne by our taxpayers if we are to simply maintain current levels of fire-related services *and* comply with the overtime provisions of the Fair Labor Standards Amendments of 1974.

Calendar Year	Work Week	Estimated Cost
1975	60 hours	$ 72,700
1976	58 hours	$ 63,200
1977	54 hours	$126,500
1978	54 hours or national average whichever less	$ 31,600 for each additional hour decreased

The current payroll for fire personnel affected by this enactment is approximately $902,000 annually. Increased costs associated with the Amendments would bring this total to nearly $1,164,400 by the end of 1977;

this represents a 29.1% increase in payroll costs without any corresponding increase in the level or quality of services delivered to our citizenry. It should also be noted that these estimated costs do not take into account increased salaries that will undoubtedly be granted to fire personnel during ensuing years; this will increase the heavy financial burden already imposed by the Amendments.

5. With the implementation of the Fair Labor Standards Amendments of 1974, the cost of providing public safety services to the citizens of the City of San Buenaventura will greatly increase. Service levels, at best, will remain the same provided that additional revenue is forthcoming to offset the increased costs; additional revenue, however, may not be available. Given statutory limitations upon our authority to increase the property tax rate, I am doubtful as to the City's ability to generate additional monies. This, then, would leave the City with two basic options. We could transfer the necessary funds from the operating budgets of other City departments, thus curtailing their activities correspondingly. On the other hand, we could reduce current manning levels in our public safety departments, thereby forcing our taxpayers to accept lesser levels of service for their same tax dollar. I am sure that both of these alternatives are entirely inconsistent with the intent of the Fair Labor Standards Amendments of 1974, and I urge the Court to enjoin its implementation so that associated cost impacts can be further explored.

Dated: November 21, 1974.

/s/ Edward E. Mc Combs
EDWARD E. MC COMBS
City Manager

Subscribed and sworn to before me this 21st day of November, 1974.

/s/ Gayle E. Osborn
Notary Public in and for said
County and State

Defendant's Exhibit No. 17

AFFIDAVIT

STATE OF CALIFORNIA)
) ss.
COUNTY OF ALAMEDA)

RICHARD W. TURNLUND, being first duly sworn, deposes and says:

That he is the City Manager of the City of Newark:

that as a part of his duties he is responsible for preparation of the City's annual budget; that as part of his duties he is further charged with the operation of the City's police and fire departments;

that the City of Newark police and fire departments will be adversely affected by the implementation of the Fair Labor Standards Act of the United States as amended;

that compliance with said Act is so onerous that it makes it impossible for the City to provide the necessary police and fire protection which is required; that compliance with this Act will require neglect of other municipal functions to protect the health, safety and welfare of the citizens of Newark;

that he bases his determination with respect to the police department on the following facts as they exist in the City of Newark:

1. Police Cadets. Police Cadets are college students in police science who are given part-time "internship employment". To restrict it to college students, the City requires enrollment for a minimum of nine units college credit during the fiscal year. This averages three hours of class work and approximately five hours of homework per week for each individual. In addition, there is approximately three hours travel time from place of residence to the school. The City will have to pay for school time under the new legislation. The pay rate is $3 per hour. The calculation is as follows:

5 Cadets x 11 hours per week x 52 weeks = 2,860 hours per year x $3 per hour = $8,580.

2. Reserves. The Police Reserves are paid for contractual work in various security and traffic control activities for private enterprises. They are not paid for volunteer work in conjunction with normal police department activities. In addition, Reserves are paid a minimum of $24 per year to qualify them under California Workmen's Compensation Law. The 1973-1974 fiscal year City cost for paying the Reserves under the Fair Labor Standards Act provisions for time they volunteered without pay would have been $45,252. This is computed on the following basis:

Contractual hours paid to Reserves
2,821 hours x $4 an hour = $11,284
Volunteer hours not paid Reserves
11,313 hours x $4 an hour = $45,252

The number of hours contributed provides an index of the impact on police activities if this force is withdrawn.

3. Regular Officer Overtime. The elimination of compensatory time will increase overtime costs by $3,006.80 based on utilization during the 1973-74 fiscal year. There were 5,171 hours of paid overtime at a time-and-one-half rate during that fiscal year and there were 286 hours of compensatory time granted to police officers and police sergeants during that period of time. The regular hourly rate for a police officer is $7 and the overtime rate is $10.50. The regular hourly rate for sergeants is $8.13 and the overtime rate is $12.20. Police officers took 212 hours of compensatory time x $10.50 = $2,226. Sergeants took 64 hours compensatory time x $12.20 = $780.80, total $3,006.80.

4. Training Time. Police officers appear for a 15-minute briefing session prior to their normal 8-hour shift. The briefing time amounts to a total of 75 minutes for each 5-day workweek x 29 officers = 2,175 minutes. 2,175 minutes ÷ 60 = 36.25 hours x 52 weeks = 1,885 hours x $10.50 = $19,792.50;

5. Summary. The Fair Labor Standards Act of 1974 would have an increase financial impact of $76,631.30 on the Police Department;

that with respect to the fire department he bases his determination of the impact on the City of Newark on the following studies:

1. Firefighter Apprentice. This position is a 40-hour per week position. As scheduled, the only imapct for the next few years would be overtime pay in those instances where the person is working overtime as a result of an emergency call at the end of his period of work on a given day.

2. Regular Personnel. During the years 1975 and 1976, the current manning level and schedule of the Fire Department personnel is adequate to meet the mandated hours.

In order to meet the 54-hour per week (216 hours in 28 days) period mandated for January, 1977, the Fire Department has two alternatives:

a. Pay each individual approximately 2 hours of overtime at 1-1/2 times per week at a cost of $24,270.48 per year.

(1) Captain $8.78 an hour = $8,218.08

(2) Firefighter $7.35 an hour = $16,052.40

b. Hire one added person per shift to cover hours given shift personnel to bring in line with the mandated hours. Cost: $45,780 Salary and City costs.

(1) One person per shift = Three personnel at approximately $15,260. Total cost of $45,780 (based on 1974 figures).

In order to meet subsequent changes in hours, a rough approximation is one man per shift to cover each two-hour per week decrease. Assuming a final average schedule of 48 hours per week (approximately 185 hours in 27 day period), the City of Newark would need an added 12 men at an additional cost of $183,120. per year (based on 1974 figures).

3. Training Time – 1975. Most fire department training is performed on duty time in the stations. However, to attend those classes or seminars which are required or of importance to continuing operations at the current level of performance could cost approximately $8,833.32.

a. Arson Seminar, Training Officers Seminar, Mechanics Seminar.

Travel Time	10 hours each	=	30 hours
Class Time	40 hours each	=	120 hours
Study Time	15 hours each	=	45 hours
			195 hours @ $8.78
			= $1,712.10

b. Training on State or Federal Mandated Programs.

(1) 832 PC = 26 hours per person $6,067.62

(2) Monthly meetings = 130 hours at $8.78 per hour $1,053.60

4. Overtime – Manning, Staff Meetings, Call Back – 1975. The overtime necessary for the above conditions would remain approximately as budgeted in the 1974-75 Budget at $6,008.

5. Overtime – Shift Change – 1975. The overtime necessary in order to properly exchange information at shift change hour, and to cover field relief on calls at this period of time would be approximately $3,013.14.

a. Shift Change, Captains – 31 hours per year = $2,449.62

b. Field Relief – 24 hours per year, 1 company at $23.48 per hour = $563.52

6. Summary. The Fair Labor Standards Act of 1974 would have immediate impact on the fire department in the areas of outside training and overtime at shift change, costing approximately $11,846.46, in addition to the current $6,008 of overtime to cover manning, call back, and staff meetings.

The costs of overtime and new personnel to meet hour requirements would range from $24,270.48 in 1977 to approximately $183,120 in 1978;

that the statements herein contained are made upon departmental statistics and studies existing in the City of Newark and are made upon information and belief resulting from these studies;

that the implementation of the Act will cause a financial disaster for the City of Newark.

/s/ Richard W. Turnlund
RICHARD W. TURNLUND

Subscribed and sworn to before me this 22nd day of November, 1974.

/s/ Anthony J. Garcia
Notary Public in and for said
County and State

Defendant's Exhibit No. 18

CITY OF NEWARK
37101 NEWARK BLVD.
NEWARK, CALIFORNIA 94560

September 20, 1974

Allen E. Pritchard, Jr., Executive Vice President
National League of Cities
1620 Eye Street, N.W.
Washington, D.C. 20006

Dear Mr. Pritchard:

Don Benninghoven has requested that California cities submit instances of employment problems created by the Fair Labor Standards Act Amendments. The following is the impact to date on the City of Newark, population 31,000, San Francisco Bay Region.

Collective Bargaining Agreements

Prior to enactment of the Fair Labor Standards Act Amendments, Newark had negotiated "education in-

centive pay" for police employees. Such "education incentive pay" amounts to 5% of base salary for accomplishment of the equivalent of an AA Degree and 7½% of base salary for the accomplishment of the equivalent of a BA Degree. The problem stems from much of the work being non-college courses. The California Peace Officer Standards and Training Institute provides a number of vocational training courses for its equivalency certifications. These are still raising some serious questions as to the strict reading of the Fair Labor Standards Act.

The problem became more complex when firemen and non-peace officer employees requested education incentive pay for work-related training. This was denied on the basis of the Fair Labor Standards Act implications and resulted in nearly hanging up negotiations for this year. The firemen have promised to "battle to the end" on the issue next year when the so-called regulations have been clarified. Here there is even less strict college work involved.

The education incentive pay has also been used as a means of recognizing those who are willing to put in more than the normal effort into equipping themselves for their employment. It is totally uneconomic if pay for attendance and study time is required.

Training

The Fair Labor Standards Act provisions will serve to block the opportunity of city employees to effectively "share the cost" of certain specialized training which has a special individual interest. For instance, the Newark Fire Department has a man interested in specific areas of

arson investigation. These go way beyond Newark's routine need for arson work. The employee is willing to spend his time at a course, defray any expenses involved in transportation and housing if the city picks up the charge for the course. Employees have combined vacations, et cetera, with these kinds of training opportunities. This is no longer possible under the Fair Labor Standards Act.

The immediate return from much of this training is not directly to the City of Newark but to a particular vocational specialization. For instance, in the case of the fireman who was extremely interested in arson investigation, he may develop information or methods which may be valuable to the fire service as a whole because he considers this a very interesting avocation which just happens to be an offshoot of his regular employment. In private industry the man may realize some financial gain from these efforts. This is not nearly as likely in the public service.

Volunteers

The City has maintained a large reserve police force for a number of years. The force was increased from some 26 to 51 in 1972 under a LEAA grant. The intent of the increase was to permit interested citizens to donate time to specific police activities including investigation, communication, community information, and records system in addition to the usual patrol and traffic duties. We have withheld replacing any personnel during the last six months because of the unknown impact of the Fair Labor Standards Act. This has cut down the police department capability substantially since these part-time

people were contributing a good deal to the police effort as well as becoming acquainted with what the police department does.

The problem with the Fair Labor Standards Act is that police reserves are paid for some work and donate other time. The city has tried to control the police function, thus has required any private agency desiring special police help to pay money to the city which is reimbursed to the reserve officers working on that detail.

The cost of paying the police reserve unit for all time expended for the City at even the minimum wage would be so prohibitive that the reserve operation would have to be substantially curtailed. This will result in lengthened investigation periods, a serious drain on traffic control capabilities, diversion of regular police to traffic control and many other routine duties resulting in jobs not being done or service time being substantially protracted.

A further byproduct is the elimination of the opportunity for a lot of people to "try out" police work. This gives them a better comprehension of what the police department activity is and its part in the entire municipal operation. This information is valuable in merely exercising good citizenship. It further has strengthened the community-police ties.

Part-time Personnel

The Fair Labor Standards Act has severely hampered recreation department programs in hiring part-time employees. Several practices undertaken for both economic and social reasons have been withdrawn.

Many of the part-time recreation leader personnel are students attending local community colleges. These

students would like to maintain as flexible a work program as possible. This means that one week they may be available 20 hours whereas the next week they could be available 60 hours. Since the students are interested in earning money and it was much easier to permit this type of operation where overtime was not a factor, such employment was encouraged. With the advent of the Fair Labor Standards Act, the work time beyond 40 hours per week has been cut off. This meant a substantial initial jumble in scheduling and inability to provide incomes to students formerly available.

The Recreation Department had also set up a work program for young people to assist in meeting social problems in the community. This work program involves park maintenance, set up of chairs in community centers, and a variety of other tasks. The limitation of the Fair Labor Standards Act on child labor eliminated any potential for taking this program down to the 10-year old age bracket (our worst vandalism age) and curtailed the utilization of these people in the 14 to 19-year old category.

Many of the younger children were having work prepared for them which enabled them to take various recreation department excursions, et cetera, rather than receiving money. This, of course, is no longer possible under the Fair Labor Standards Act. It is not economic for the City to employ these young people at minimum wage.

Compensation Time

One of the biggest employee gripes resulting from the Fair Labor Standards Act is the elimination of

compensation time. Compensation time permitted employees to build up a bank of time to be used for personal business without any ups and downs in their paycheck. Although the present system compensates them for overtime, there is no assurance that the money will be saved to offset the necessity to take off two hours for personal business a month later. Employees much prefer the opportunity to hold a stable monthly rate and vary hours as needed.

Hopefully, this is helpful to your preparation of the litigation.

Yours truly,

/s/ Richard W. Turnlund
RICHARD W. TURNLUND
City Manager

Defendant's Exhibit No. 19

CITY OF MONTEBELLO
1600 BEVERLY BOULEVARD
MONTEBELLO, CALIF. 90640
(213) 722-4100 • 685-7170

November 22, 1974

Mr. Charles Rhyne
Rhyne & Rhyne
400 Hill Building
Washington, D.C. 20006

Dear Mr. Rhyne:

Pursuant to requests from the National League of Cities, this letter will attempt to specify some of the dollar impact of the Fair Labor Standards Act Amendments of 1974 on the City of Montebello.

Most of the additional costs to the City of Montebello, as a result of the FLSA, are difficult to estimate with any accuracy at this point in time. This is especially true of costs within the police department and the costs which relate to time and one-half provisions for general employees. In addition, it is almost impossible to accurately estimate the future costs caused by the elimination of compensatory time as a method of compensating employees.

Increased costs for providing fire suppression services, however, are not as difficult to estimate. This is due to the well defined manning requirements and the strict

scheduling which must be followed in providing fire suppression services. I have attached the estimates for the City of Montebello in this regard; these estimates are based on the time and one-half overtime pay requirements of the FLSA, and the following data regarding the existing wage and hour conditions as of the date the Fair Labor Standards Act Amendments of 1974 was signed into law.

1. Fire service employees were scheduled on a 58 hour per week work schedule.

2. A total of 54 employees were involved in providing fire suppression services.

3. Annual salaries (top step) for fire suppression employees were as follows:

a. Battalion Chief	$20,580
b. Captain	$16,920
c. Engineer	$14,832
d. Dispatcher	$ 9,127

4. 1973-74 total overtime budget – $50,000

5. 1973-74 total fire suppression budget for salaries, wages and fringe benefits – $985,031.

I hope this information is of some assistance to you in your preparation of the lawsuit challenging the constitutionality of the extension of the FLSA to State and local Government. If I can be of any further assistance, please do not hesitate to contact me.

Very truly yours,

/s/ Roy R. Pederson
Roy R. Pederson
City Administrator

CITY OF MONTEBELLO
INCREASED COSTS FOR PROVIDING FIRE SUPPRESSION SERVICES TO MONTEBELLO RESIDENTS AS RESULT OF FLSA AMENDMENTS OF 1974*

January 1, 1975	
Increase In Overtime Costs	$10,725
% Increase In Overtime Costs	21.5%
% Increase In Total Salary Costs	1.1%
January 1, 1976	
Additional Increase In Overtime Costs	$2,962
% Additional Increase In Overtime Costs	5.9%
%Additional Increase In Total Salary Costs	.3%
January 1, 1977	
Increase In Regular Salary Cost (6 additional fire fighters)	$104,235
% Additional Increase In Total Salary Costs	10.6%
% Increase In Number of Fire Employees	11.1%
Summary	
Increase In Overtime Costs	$13,687
Increase in Regular Salary Costs	104,235
Increase In Total Salary Costs	$117,922
% Increase In Overtime Costs – 27.3%	
% Increase In Total Salary Costs – 12%	

*All figures are stated in terms of estimated annual costs

I, ROBERT J. FRANZ, Assistant to the City Administrator, City of Montebello, California hereby swear under penalty of perjury that the cost estimates included in the letter (with attachments) attached hereto, are true and correct estimates based on all available factual data. I hereby further certify that all factual data included in the letter (with attachments) attached hereto is true and correct.

/s/ Robert J. Franz
Robert J. Franz

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

Subscribed and sworn to before me this 22nd day of November, 1974.

/s/ Helen F. Liggett
Notary Public in and for the State
of California, County of Los Angeles

Defendant's Exhibit No. 20

CITY OF MONTEBELLO
1600 BEVERLY BOULEVARD
MONTEBELLO, CALIF. 90640

October 3, 1974

Mr. Allen E. Pritchard
Executive Vice President
National League of Cities
1620 Eye Street N.W.
Washington, D.C. 20006

Dear Mr. Pritchard:

In response to a request from Don Benninghoven of the League of California Cities, this letter will attempt to illustrate the impact of the Fair Labor Standards Act on the City of Montebello. It is my understanding that this information is to be used in conjunction with the proposed law suit challenging the constitutionality of the extension of the FLSA to State and local government.

I will attempt to follow the general outline of the questionnaire prepared by the League of California Cities in describing the impact of the various provisions of the FLSA.

VOLUNTEERS – The extension of the FLSA to the City of Montebello has had significant impact on the ability of the City to utilize volunteers in a manner most beneficial to the public being served. The impact on two City departments, Police and Parks & Recreation, has been particularly significant:

POLICE

1. Prior to the application of the FLSA, the City utilized "reserve" officers (numbering approximately 40) for various police department functions such as special event coordination, fingerprint officer, and booking officer. These officers also ride in patrol cars as the "second man" in the patrol car.

Reserve officers are paid $25 a month as compensation for their contribution to the City. There is a wide variance in the number of hours worked per month by reserve officers depending on current activities and the individual officer's desires. It is not unusual for a reserve officer to work as many as 40-50 hours per month, although the average would be approximately 20 hours per month. Reserve officers, obviously, are not performing the various functions described above because of the amount of compensation offered by the City. They are volunteering their time as a public service to the City and enhancing their knowledge of police activities. The City has generally considered $25 per month compensation as a recognition of the fact that a reserve officer must furnish his uniform and equipment at his own expense. It has never been considered compensation for hours worked since these individuals are volunteers.

2. Due to the application of the FLSA to the City of Montebello, the number of hours worked per month by reserve officers is now limited to $25 divided by the minimum wage or approximately 12-1/2 hours per month. Detailed timecards must also be maintained which were not previously necessary for the officers.

3. Sections 776.5 and 785.6 of the Act of Federal Interpretative Bulletins requires this change in the practice of compensating reserve officers.

PARKS & RECREATION

1. Prior to the application of the FLSA, the City hired recreation aides for the summer months to help with the City's various recreation programs. Many of the individuals hired for these purposes are more interested in helping out with the recreation program (as a public service) than with the compensation received for their work. Consistent with this, many of the individuals work more than the number of hours per week (or year) that they are compensated for. The number of hours per week (or year) these individuals can be paid is based on an annual review of the various recreation programs during the budgetary process. At that time, it is determined what level of services can be funded from the taxpayers' funds, and the amount of money budgeted is based on the determination. The individuals hired may be willing to provide a higher level of service than budgeted out of taxpayers' funds, and, therefore, volunteer their time over and above the number of hours they are compensated for.

2. Due to the application of the FLSA to the City of Montebello, the number of hours worked per week (or year) by recreation aides is limited to the amount of hours budgeted during the annual budget process. Individuals are not allowed to volunteer their time to assist in recreation programs over and above their compensated hours.

3. Section 785.11 of the Act of Federal Interpretative Bulletins requires this change in the practice of utilizing recreation aides.

TRAINING – As a part of the agreement with the Montebello Police Association during the past year's meet

and confer process, the City implemented an educational/merit incentive program for the police department. The program had to be modified prior to adoption (by deleting a portion of the program) because of certain FLSA requirements:

1. Prior to the application of the FLSA, the City could have required that a police department employee complete a certain number of units of education per year in order to maintain eligibility for the proposed educational/merit incentive pay. This requirement is considered important to the City management since additional pay for the completion of a certain level of education does not provide "incentive" for education once the level is obtained. The City feels that a workable program for additional pay for education should include a maintenance provision to insure that the individual continues to earn his additional pay.

2. Due to application of the FLSA to the City of Montebello, the requirement to complete a minimum number of units per year was deleted from the educational/merit program. This is due to the fact that provisions of the FLSA require that the City compensate the employee for the hours spent in a classroom as well as study time for all class work. This would significantly increase the cost of the educational/merit program, and would require an additional administrative procedure to monitor and verify hours spent by employees in the classroom and studying. This additional requirement is not within the intent of the educational/merit incentive program which was agreed to during the meet and confer process.

3. Section 785.28 of the Act of Federal Interpretative Bulletins prevents the inclusion of such an educational maintenance requirement unless compensated as described above.

COMPENSATORY TIME

1. Prior to the application of the FLSA, the City granted compensatory time as a method of paying employees for overtime hours worked. Paid overtime was also utilized when authorized by a specific budget appropriation.

2. Due to the application of the FLSA to the City of Montebello, compensatory time is no longer authorized and all overtime situations now must be anticipated in advance during budgetary review.

3. One effect of this provision of the FLSA, is to reduce the City's ability to respond to emergency situations in those departments or activities in which no overtime was budgeted during the annual budget process. The estimated additional cost to pay overtime, rather than grant compensatory time, for fiscal year 1974-75 is (approximately 1% of the City's property tax revenue) $15,000.

EXEMPT/NONEXEMPT CLASSIFICATIONS

1. Prior to the application of the FLSA, the City had adopted by a resolution of the City Council designations of management and non-management employees.

2. Due to the application of the FLSA to the City of Montebello, all job classifications within the City must be reviewed to determine whether the position is exempt or nonexempt under the FLSA. Since the exempt/nonexempt designations do not coincide with the City's management/nonmanagement designations, two separate systems of designation must be maintained on a continual basis.

RECORDKEEPING

1. Prior to the application of the FLSA, the City's recordkeeping requirements were limited to those required for State, Federal, and retirement reporting purposes, and for internal recordkeeping requirements.

2. Due to the application of the FLSA to the City of Montebello, additional records must be maintained which the City has no use for except to comply with the recordkeeping requirements of the FLSA. Examples of such records are:

Total daily or weekly straight-time earnings; and

Total overtime pay for the workweek.

The City of Montebello did not maintain the records prior to the application of the FLSA since the City pays its employees on a biweekly basis and has no need for the above weekly information.

TIME AND A HALF OVERTIME PAYMENT

1. Prior to the application of the FLSA, the City of Montebello granted either compensatory time or straight-time pay for overtime hours worked.

2. Due to the application of the FLSA to the City of Montebello, time and a half payment is required for all overtime worked by City employees (excluding safety, transit and exempt employees).

3. The total cost impact of the time and one-half pay requirement will not be known until guidelines are issued by the Department of Labor regarding overtime pay for safety employees. Current estimates are that the ultimate cost increase could be as high as $140,000 a year at current pay rates. This is approximately 2.5% of the City's total cost for salary and fringe benefits, and would

require a property tax increase of approximately 7% to fund from that revenue source.

I hope that the information provided above will be of some assistance to the NLC in its preparation of the proposed law suit. As most of the cited examples indicate, the City of Montebello has developed, over the years, a personnel and administrative system which is cognizant of: employee needs, taxpayer concerns, public service concepts, ability to pay, and sound personnel practices. The application of the Fair Labor Standards Act to the City has disrupted the system by mandating rules and regulations which do not recognize all of the above considerations.

Please do not hesitate to contact me if you feel I can be of further assistance.

Very truly yours,

/s/ Roy R. Pederson
Roy R. Pederson
City Administrator

Defendant's Exhibit No. 21

CITY OF MENLO PARK
CIVIC CENTER
MENLO PARK, CALIFORNIA 94025

October 4, 1974

National League of Cities
1620 "I" Street, N.W.
Washington, D.C. 20036

Gentlemen:

The purpose of this letter is in response to a questionnaire sent to us from the League of California Cities concerning the Fair Labor Standards Act and how it has effected our municipality. At this point in time the impact has been signifigant; however, many issues remain unresolved and therefore the impact to date very well may not represent total impact of change forced on our municipality by this act.

Menlo Park has historically paid twice a month. We have had to shift over to paying on a bi-weekly basis. To do this has required the use of four man nonths to change individual payroll records on each of our 150 full-time employees and our part-time employees as well. As of September 1, we began paying on a bi-weekly basis. Some organizational trauma has occurred because some mistakes were made in this conversion, and some people were not paid properly. These transition difficulties with the employees are of a minor nature however.

We have learned that some cities are not converting over from paying twice a month to a system of paying

every two weeks. These cities have chosen instead to keep separate records: One set for their payroll system and one set to meet the hourly record requirements of the Fair Labor Standards Act. We consider this obviously to be an inefficient way of doing things however we recognize that some cities might not be in the position where they can afford to reallocate resources on an instantaneous basis to restructure their whole payroll system as we have felt forced to do. Perhaps the largest single area of difficulty that has grown up as a result of the passage of the Fair Labor Standards Act has been the disallowing of compensatory time off. We had a system where we gave the employee an option of either comp time or cash time-and-a-half money overtime. This option has been taken away from the employee and many feel that we, the management of the City, have inflicted an unnecessary and unfair restriction on their behavior patterns. We had a good system in the eyes of employer and employee and the Fair Labor Standards Act has destroyed that system. Another area that Fair Labor Standards Act is impacting is in our Police Department. The exact nature of the impact is difficult to determine at this point because the rules are not clear for safety officers. Historically, we have operated in the Police Department with a regular force of about 45 and a reserve force of about 30. The reserves have been paid when filling in on shifts for regular officers. Reserves have also been used for things where regular officers would not normally be used. For these activities the reserve officers have not been paid. The City has benefited by the expansion of service, and the reservist has benefited be receiving police training. The City's affirmative action program has been assisted immeasurably by being able to

use the reserves as an entry vehicle into the regular department for minority candidates. The Fair Labor Standards Act basically says you're either a worker on the payroll or you're a volunteer. We are having a problem with that and we are having difficulty with determining whether or not our reserves are safety officers or miscellaneous employees and therefore don't know whether the rules went into effect May 1 or go into effect January 1.

With our regular officers we have yet to determine the total impact on work schedules and what new additional payroll changes we will have to be making for them. It is our opinion that with regard to the City of Menlo Park the Fair Labor Standards Act has cost the taxpayers money, has potential to reduce the quality of service and create organizational disharmony between employer and employee. That in summation is our opinion of the impact of this act.

Very truly yours,

/s/ Richard B. Kerwin
Richard B. Kerwin
Assistant City Manager

Defendant's Exhibit No. 22

CITY OF MENLO PARK
CIVIC CENTER
MENLO PARK, CALIFORNIA 94025

November 21, 1974

Mr. Charles Rhyne
Rhyne & Rhyne
400 Hill Building
Washington, D.C.

Dear Mr. Rhyne:

I have been asked by the League of California Cities to submit information to you concerning the anticipated effects of the Fair Labor Standards Act on our police department operations in terms of increased costs and/or diminished services to the public. While the total impact is difficult to determine as yet, we do know that substantial organizational changes will occur which will end our Reserve program and will produce less service for greater costs.

Specific dimunitions of service will be in the areas of crime prevention, traffic enforcement, case investigation and follow up, non-emergency and emergency indident response and both service and crime related calls.

We estimate that to prevent this reduction of service will require the employment of six additional officers to be added to the 38 sworn personnel already working. The costs of doing this will be approximately $120,000 annually – and we can't afford it!

Very truly yours,

/s/ Richard B. Kerwin
Richard B. Kervin
Assistant City Manager

Defendant's Exhibit No. 23

CITY OF INGLEWOOD CALIFORNIA
CIVIC CENTER
ONE MANCHESTER BOULEVARD
INGLEWOOD, CALIFORNIA 90301

October 4, 1974

Mr. Allen E. Pritchard, Jr.
Executive Vice President
National League of Cities
1620 Eye Street, N.W.
Washington, D.C. 20006

Dear Mr. Pritchard:

With the inclusion of local governments in the Fair Labor Standards Act Amendments in May of this year came all of the problems that one might expect in this City and all of the other surrounding cities. Disruption and chaos are inherent in any Federal or State regulations that require uniform application to all cities with no consideration of the variety of personnel practices, policies and procedures that exist within the individual cities.

The city of Inglewood hastily moved to comply with the law on May 1, 1974. The basic problems to be solved at that time were to 1) determine exempt and non-exempt personnel; 2) establish an acceptable record-keeping system and; 3) abolish items contained in collective bargaining agreements that were in conflict with the FLSA.

One of the items contained in the agreement between management and the employee associations in this City was a policy of granting either overtime pay or compensatory time off at 1½ times the regular rate of pay for all hours worked in excess of forty hours. It is significant to note that initial examination of past employee pay records show that the majority of the employees actually utilized the compensatory time off as opposed to overtime pay. Since FLSA disallows this practice, the compensatory time off has been abolished. Yet employees still request compensatory time off but must be refused since the enactment of the amendments.

Emergency services of one type or another always appear during the year. Management has utilized "comp time off" extensively to pay for these unanticipated occasions. Even though "comp time" has stopped, emergencies have not. Funds provided for these services will have to be shifted from predesignated areas.

FLSA requires jurisdictions to maintain accurate records showing hours worked and wages paid. The ideal way of maintaining this type of information would be to provide a single printout. However, Inglewood has a payroll system that was computerized in the 1950's. The system is an exception payroll system which means that checks are automatically issued for all employees at the applicable 40-hour rate without the submission of time cards. Time cards are entered only for exceptions, i.e., overtime, sick leave, vacation. Therefore, the computer printout only shows actual dollars paid to an employee and not the hours worked. In order to comply with the law it became necessary to design a system of log sheets for all employees showing actual hours worked in addition to the computer printout showing wages paid. In

some of the larger departments this required an additional employee to manually prepare and maintain the necessary records. The current payroll system has been revised many times and has reached the point where programs can no longer be revised or added.

FLSA requires that hours of off-the-job training required by an employer are considered hours worked and must be paid at the minimum wage. The Police Department, in an attempt to achieve affirmative action goals, has been providing employment opportunities to 15 young men and women interested in a career in law enforcement. Trainees work 20 hours per week and attend school 20 hours per week. These employees were paid $3.57 per hour for the 20 hours worked. The City provided funds for tuition and books. However, the twenty hours of school were not considered hours worked and were not paid. One possible solution to the problem was to provide $2.00 per hours for 40 hours. However, that was not possible since the City was bound by agreement to pay a minimum $3.57 per hour. The other solution was to provide $3.57 hourly for all 40 hours. The City could not afford this expense. The end result was to abolish the 20 hours of school, thereby relieving all signs of impetus from the program.

A few of the employees in the Police Department who, in addition to their regular 40-hour positions with the City, also worked part-time as matrons in the jail. The FLSA requirement of paying the part-time hours at 1½ times resulted in the employees loss of part-time opportunities for those employees.

The limitations on determining exempt status through the three categories (administration, executive and professional) were not broad enough. Consideration was

not given to the employee who earns the high salary levels and performs specialized duties that do not fit the three defined categories. Often these employees perform vital services that are not always limited to a 40-hour week. Overtime pay is extremely high for these employees.

These are just a few of the problems and solutions experienced in this City. The proposed regulations for safety will increase the burden of government.

I heartily endorse the actions of the League in its pursuit of justice for local governments. If you require any additional information please contact me.

Yours truly,

/s/ D.W. Ayres
Douglas W. Ayres
City Administrator

Defendant's Exhibit No. 24

CITY OF CLOVIS
CITY HALL, 533 POLLASKY AVE.
CLOVIS, CALIF. 93612

October 9, 1974

Mr. Allen B. Pritchard, Jr.
National League of Cities
1620 Eye Street, N.W.
Washington, D.C. 20006

Dear Mr. Pritchard:

The following information is provided in response to the request by Don Benninghoven of the League of California Cities.

The application of the Fair Labor Standards Act to local government has had the following effects on the City of Clovis:

1.. Compensatory Time

It has eliminated the use of compensatory time off, necessitating additional overtime cost to the City. Employees have been affected in an equally unpleasant manner in that they have previously been able to miss work for doctors appointments, to care for sick children, etc., by using compensatory time. This type of leave must now be taken as "leave without pay". Compensatory time has also been valuable to employees who must work holidays, in that they have been able to schedule their own holidays through use of compensatory time. While it is still possible to allow an employee time off in the same

work week, it is difficult for an employee to accumulate a whole day of credit in one week and impossible to schedule anything in advance.

2. Overtime

The City pays for hours in excess of eight (8) in one day, at the overtime rate. The Fair Labor Standards Act has not required this, but the city is bound to it by a long-standing local agreement. Therefore, scheduling a long day for an employee one day to allow time off on the next is too expensive to be reasonable.

3. Training

Employees required to attend training schools have been placed in a position by the Fair Labor Standards Act that if "homework" is required, overtime must often be paid. The same applies to travel time. While attendance at these schools has generally been sought by employees who see the value to careers and, in the case of Fire and Police personnel, is necessary for the safe conduct of their job, the City may have to cut back on the number of employees able to attend in the future for financial reasons. While clarification is not yet available, the City's educational incentive program for Fire and Police personnel, which "encourages" the continuation of their education, may become too costly if the City is required to compensate their class and study time at the overtime rate.

4. Volunteers

Volunteer and reserve employees have been able to gain work experience through completion of a set number of training hours per month in addition to hours of paid employment. The Fair Labor Standards Act will require that these employees either be paid for all hours, or be denied the opportunity to receive any payment at all.

5. Student Interns

The City has been actively involved in internship programs with California State University, Fresno, to give students the opportunity to observe and participate, to a limited extent, in the daily governmental operations. Students have often been compensated for their work through school credit and a small stipend. The Fair Labor Standards Act will cause the City to either eliminate the program or the pay, excluding at least some students either way.

6. Meetings

The City would like to be able to encourage participation to subprofessional personnel at evening meetings if they are interested. With the Fair Labor Standards Act, the City would be required to pay overtime for their participation and must be careful to avoid even encouraging their interests.

7. Employee Incentive

Cities have previously been able to provide some flexibility to employees to work scheduling and through the use of compensatory time. The Fair Labor Standards Act has removed the flexibility, making work hours "hard and fast". Adding to this the loss of training opportunities and the chance to "work one's way up" through participation at meetings and working after hours, the Fair Labor Standards Act threatens to stifle employee incentive in the non-exempt classes.

It is my hope that this information will be of some assistance to you. Your efforts are greatly appreciated.

Very truly yours,

/s/ Allen L. Goodman
ALLEN L. GOODMAN
City Manager

Defendant's Exhibit No. 25

CITY OF CORONADO
1825 STRAND WAY
CORONADO, CA. 92118

October 4, 1974

Mr. Allen E. Pritchard, Jr.
Executive Vice President
National League of Cities
1620 Eye Street, N.W.
Washington, D.C. 20006

Dear Mr. Pritchard:

Per your request, the following consists of the impact that the Fair Labor Standards Act has on the City of Coronado in terms of costs and services:

1. Collective Bargaining Agreements: The City has negotiated Memorandums of Understanding and also has a provision in its Civil Service Rules a benefit where an employee can take compensating time off as a method of payment for overtime worked. In many instances, employees desire to accumulate this time over a period of months and take off the time at the mutual convenience of the City and of the employee. Due to the passage of the Fair Labor Standards Act, the City was required to amend its Civil Service Rules to basically eliminate compensating time off unless it was given in the same payroll period in which it was earned.

2. Scheduling: Some minor changes will be required in the City's Fire Department as a result of the Fair Labor

Standards Act for scheduling purposes. The City will probably be required to restructure the working schedules to provide for 28-day work periods for volunteers. In that the City of Coronado does not pay its volunteer workers a stipend, the Fair Labor Standards Act does not pose a problem to the City of Coronado in this area.

3. Seasonal Peaks and Valleys: The passage of the Fair Labor Standards Act has created a small problem in this area. The City employs seasonal recreational workers and lifeguards due to the nature of Coronado being a summer tourist attraction. These workers are required to work occasionally over forty hours per week during the summer months. Therefore, the City will now be required to pay overtime at time and a half to these workers where in the past we were not required to pay this overtime since the employees were paid on an hourly basis based on hours actually worked.

4. Training: The City of Coronado has not encountered or does not anticipate any problems in this area.

5. Incentives: The City does not anticipate any problems nor has encountered any problems in this area.

6. Compensatory Time: The basic abolition of compensatory time will result in increased overtime cost to the City of Coronado in that the City will be required to pay its overtime in cash instead of the prior method of compensating the overtime by providing the employee with time off in the future.

7. Joint Employment: This area will not significantly impact the City of Coronado, however, there may be isolated circumstances where employees are currently working two distinct jobs for the City. However, in the future, the employee will be required to terminate his second job.

8. Social Services: It is not anticipated that the minimum wage rate will significantly impact the City of Coronado due to the fact that our lowest paid hourly position meets the minimum wage requirement under the Fair Labor Standards Act.

9. Leave: This area will not create a problem for the City of Coronado in that the City only pays overtime for those hours actually worked. However, the City does pay time and a half overtime for all overtime worked over 8 hours a day and/or 40 hours a week. This applies to all classifications except the Fire Department and non-permanent hourly positions.

10. Changing Pay From Annual or Monthly to Hourly: Since the adoption of the Fair Labor Standards Act, no additional City employees have been put on hourly wages. The only hourly employees are those which have always been paid on an hourly basis, and those are typically the Recreation workers, lifeguards, and other intermittent employees.

In conclusion, the most significant impact of the City of Coronado is in the area of the fire service. The City currently has a 63-hour work week for all firemen. Effective January 1, the maximum amount of hours that a fireman can work without being compensated overtime is 60 hours per week which will require that the City either pay the additional overtime required or reduce its work week to 60 hours. The additional cost to the City if the City were to pay the required overtime in lieu of lowering the work week would amount to $33,363.00 in

1975, $59,363.00 in 1976, and $111,363.00 in 1977.
If you need additional information, please advise.

Sincerely,

/s/ R. C. Oakley
Richard C. Oakley
Assistant to the City Manager
Personnel

Defendant's Exhibit No. 26

CITY OF SUMTER
SOUTH CAROLINA
29150

September 19, 1974

Mr. Allen E. Pritchard, Jr.
Executive Vice President
National League of Cities
1620 Eye Street, N.W.
Washington, D.C. 20006

Dear Mr. Pritchard,

In reply to your recent inquiry, following are the effects of the Fair Labor Standards Act (FLSA) upon the operation of the City of Sumter, South Carolina.

1. Overall budgetary effect.

Faced with a prior year budget deficit, additional annual salary adjustments, requirements to reach $1.90 minimum wage plus an estimated $125,000 annual salary cost that will become effective January 1, 1975 places the city in a severe financial dilemma. The increase of the minimum wage to $1.90 per hour not only affects the employee receiving less than that now but also the entire pay scale from top to bottom. If the lowest wage is increased all other wages must also be increased to maintain the relative degrees between pay grades. This upward "domino effect" is directly inherent in the implementation of FLSA and is actually the greatest single cost factor involved. This total increase of approximately $235,000 for adjusted salaries, plus rising prices for all other items procured, leaves the city with only two alternatives:

(a) Substantial tax and utility rate increases, and/or
(b) Reduction of services.

Both of these alternatives are deplorable since they have the effect of lowering the discretionary income of the poor, the middle class worker, and especially the senior citizens who have to survive on a fixed income. Effective July 1, 1974 our tax millage *was* increased seventeen mills (30%) and our utility rates were increased approximately forty percent. The FLSA laid these added burdens on our citizens.

2. Compensatory time.

The most unfortunate provisions of the FLSA reguarding employee moral are those dealing with compensatory time. Our employees in the past have taken compensatory time in lieu of payment. Now, under FLSA we have had to stop compensatory time

except during the pay period in which it was earned which is usually unfavorable to both the city and the employee. The workload generating the extra work normally extends several days which usually precludes the city from being able to let the employee off within the pay period, and the employee would rather save his compensatory credits until such time that he can use them for some special occasion, i.e. long week-end, fishing trip, etc.

In the Fire Department, firefighters often "come-in" one-half hour, an hour, or even a whole day for their friends who need to leave "early" or to be "off". This practice is very acceptable to the man and the city in that one qualified man works for another. However, under FLSA and the Department of Labor (DOL) interpretations thereto, this practice has had to be discontinued.

It is estimated that the loss of compensatory time as a feasible, workable means of compensating employees will cost the city and the local taxpayers not less than $20,000. From the tax payers viewpoint, this amount alone represents a 1.3 millage increase in property taxes. Some rulings allowing mutually agreeable "switching" of work hours and compensatory time are badly needed. Without these, the employees, whom the law is designed to help, are the ones ultimately to be hurt.

3. Fire Fighters who work part-time.

Presently, there are fourteen firefighters who work in other city departments on their days off from the fire department. As of January 1, 1975 these firefighters will lose their part-time work because of the sixty hour maximum work, or because they will lose their firefighter status and thereby be eligible for overtime after forty

hours per week, or both. These men now work an average of twenty hours per week in their part-time positions.

This is another example of the law hurting the people it was designed to help. Under the present rulings, the city cannot afford to continue to allow the firefighters to supplement their income through other employment with the city. This seems especially foolish since they can work the same or more hours with another employer. Because the city will simply terminate the part-time firefighters, the firefighters lose.

It seems that firefighters should have the same opportunity to work for the city on their "days-off" as for any other employer. To fill the void left after the part-time firefighters are terminated, the city will be forced to hire fulltime people to accomplish part-time job requirements; the direct cost to the city, not counting a corresponding loss of productivity, will exceed $23,000.

4. Marginal employees.

The city employs approximately five people who are marginally productive due to age, lack of training, and/or lack of ability. Before implementation of FLSA these people were employed below $1.90 per hour because their productivity in the job they performed was below the value of $1.90 per hour. Further, these employees did not want to be on "welfare" but have enough pride to want to work and to pay their own way. However, due to FLSA and the city's economic realities, we have two alternatives:

(a) Waste taxpayers money by employing these people at $1.90 per hour when they cannot produce enough work to justify that wage rate, or

(b) Terminate the employees because they cannot perform the "whole" job.

While it is undesirable, the city has no alternative under FLSA but to terminate them and all other marginal employees. The terminated employees then will become a "social liability" dependent upon the government for their economic survival. This benefits neither society nor the individual.

5. Attendance at meetings after hour.

Some city employees covered by FLSA, such as various staff personnel, codes enforcement inspectors, planning officials, etc. are required as a normal part of their job to attend evening meetings with various governing bodies, review boards, advisory bodies, etc. The requirement to consider these meetings as work time is discriminatory and beyond the intent of FLSA because compensation for the evening meetings is included in the respective salary the same as any other component of the job. To be fair to the employer, if evening meetings are considered work time, the employee's *hourly* rate would have to be reduced, which would immediately open another "Pandora's box" of employee relations problems.

A second point: these employees also are attending the meetings as a part of their training. In most instances the directors, or chief officials in these functions, are exempt from FLSA coverage. Again the city is left with two alternatives:

(a) Employees covered by FLSA would not attend evening meetings, or

(b) Let them attend, with compensatory time and/or overtime as payment for attendance.

With the present financial realities and the current daily work load, alternative "b" is unacceptable. Therefore, the employee is again hurt because he loses his training opportunity and the "prestige" afforded by attending the evening meetings.

6. Sanitation worker's incentives.

Approximately twenty-five sanitation workers are currently working under a daily incentive system. Normally, their actual hours worked average about thirty-two hours per week, but they are being paid for forty hours. Because of the difficulty in recruiting employees to "tote" garbage and the urgent health facets of garbage collection, the city has only no alternative under FLSA but to continue paying for forty hours when less hours are worked, plus overtime for the excess hours over forty. To many sanitation workers, the most important part of his job is the incentive system which permits them to "get-off" an average of two hours early each day. If we started paying for the *actual* hours worked (in other words, remove the task aspect of the job) almost all the sanitation workers in our opinion would quit. Those who did not quit could "slow down" their performance to insure earning overtime. Paying for such a "slow down," or decreased productivity, is economically unacceptable to the city.

The FLSA and the current labor supply, at the minimum, unfairly forces the city to pay for work not performed and, at the maximum, opens "Pandora's box" of unending personnel and financial problems for the city and longer work hours for the employees.

The above paragraphs basically describe the effects of FLSA on the operations of the City of Sumter. In my professional opinion as a career public administrator, the financial effects of the FLSA will be greater than the rather conservative estimates expressed in this report but will not be apparent until more time has elapsed. The provisions of the FLSA, coupled with a discontinuance of Revenue Sharing (should this become a reality – God

forbid) and the continued inflationary spiral will result in financial disaster for many cities. The only general alternatives seem to be:

(a) A drastic increase in local taxation

(b) A drastic reduction of services available to municipal citizens, and/or

(c) The development of radically new methods of municiple operation including revenue generation.

The question then becomes, can "c" occur before the financial disaster arrives and "a" or "b" has to be implemented?

Hopefully this summary will be useful in your efforts. If additional information is needed please let us know. Thanks for your interest.

Sincerely yours,

/s/ Powell Black
R. Powell Black
City Manager

Defendant's Exhibit No. 27

CITY OF LODI
CITY HALL, 221 WEST PINE STREET
LODI, CALIFORNIA 95240
(209) 368-0641

September 26, 1974

Mr. Allen F. Pritchard, Jr
Executive Vice President
National League of Cities
1620 Eye Street, N.W.
Washington, D.C. 20006

Dear Mr. Pritchard:

Mr. Don Benninghoven, Executive Director of the League of California Cities, has asked that we forward to you the impact of the FLSA on local government. In his prologue, he indicated that one of the arguments Mr. Rhyne wants to document is that state and local governments serve as laboratories for experimentation with new and differing personnel practices.

I think that that point is dysfunctional to the problem at hand. If we truly are laboratories, then we should be open to experimentation, tampering and tinkering. I submit that the personnel practices of a city – any city – reflect the local needs of that city in terms of functions performed, ability to pay, level of service and desires of the community. These decisions must be made by the local legislative body and not congress and the body politic of Washington, D.C.

Among the disruptive factors we in Lodi are faced with as a result of the recent amendments to the Fair Labor Standards Act are: Collective bargaining agreements, scheduling, additional personnel, volunteers, training and professional development, joint employment, and payroll computation.

Collective Bargaining Agreements:

For the past five or six years we have negotiated at the table, provisions covering working conditions, hours of work, compensation, time off and the like. This procedure resulted in a great deal of give and take on both sides of the table, but now this law negates some of those provisions or mandates the agreed upon provisions will cost more.

For instance, in our utility operation we do not have need for a full-time night trouble-shooter, but must make provisions to cover emergencies. The agreed-to provisions were that we would pay a man two hours' pay each night to be available for trouble calls – the man is free to pursue his own activities but must be able to be contacted. If he is called out, he is guaranteed two hours pay at time and one-half regardless of the amount of time he worked, and will be paid for any time in excess of 2 hours at the time and one-half rate.

Under the FLSA Act, the "Standby Pay" increases the man's hourly wage when he is required to work because the standby pay for hours not worked increases his hourly rate of pay. This is an unwarranted increase in costs to the city.

In all of our agreements we have provisions for compensatory time off which is earned at the time and one-half rate. This was requested by the employees groups so that the individual could have time available for

personal business. The work was done for the convenience of the employer, but the time off was also taken at the convenience of the employee. Our employees have even complained that compensatory time off is their right, because it is in a contract which Congress has nullified.

Scheduling:

As a result of the 40-hour per week provision, it has been necessary for us to reschedule certain operations that require 24-hour per day manning. In most cases, the changes made were beneficial to the employees and the City. Fortunately, we were able to rearrange schedules so that no additional non-police and fire fighting personnel are required. Previous work schedules were established through the bargaining process and that process has been circumvented through the provisions of this Act.

Additional Personnel:

The regulations on public safety employees have not yet been made available; so we do not know all the ramifications in that area. We do know that it is necessary to add additional personnel to our fire fighters to meet the requirements of the Act. The City of Lodi added two additional fire fighter positions. When we must reduce the work week to 54 hours or less, we must either add personnel or pay additional overtime.

During past years, we have increased fire fighters salaries and wage supplements in lieu of reducing on-duty time – this, as a result of collective bargaining.

The resultant added costs in this area result in reshuffling priorities and reducing other services which are no less important, but because of this law pre-empt such things as recreation and youth programs, additional police coverage, and the like.

Training:

The entire field of water quality is undergoing a metamorphisis of upgrading the capabilities of those persons working in the field as well as keeping up with the state of the art. The State requires certain minimum standards of employees in this field which requires outside study and training. The City has recognized the fact that when a man becomes more competent, he is entitled to more income – that past year we increased the salary of all of our sewer plant operators by 2.5% in recognition of their increased competence by meeting State requirements.

To assist our people in reaching these goals we pay for their tuition, membership and expenses in trade and professional associations and allow them time off to go to their meetings. Because of the provisions of the FLSA we no longer can do this, because we recognize that the City does receive a benefit from their participation. Now we both lose.

The same thing applies to sub-professional engineering positions throughout the City.

Joint Employment:

We hire a number of full-time and part-time custodians, recreation leaders and maintenance personnel. In the past a full-time person could apply for a part-time position in a different department and/or a different function. The City benefited in that we knew the calibre of the work and character of the part-time employee; but the individual benefited in that he could earn extra money if he so desired. As a result of the FLSA, the employee has suffered a reduced income and the City has the expense of processing more personnel – even though our payroll costs will remain the same.

Payroll Computation:

The City of Lodi does not have the benefit of a computer, therefore payroll is computed mechanically. We compute payroll on a monthly basis. When overtime is paid, separate calculations for that particular week must be performed rather than on a monthly basis – this is complicated more when a seven-day period includes the end and the beginning of a month.

As a result the City is having to redo its payroll system. We know one day we must install some sort of electronic data processing, but the more complicated payroll function will move that date forward.

I know I have not covered all the subtle impacts of the Act but I feel I have covered the major impact on the City of Lodi. If we can amplify this data or provide you with further information we will be glad to do so. We strongly support your efforts and urge your strong prosecution of this most important issue.

Very truly yours,

/s/Jerry L. Glenn
Jerry L. Glenn
Assistant City Manager

Defendant's Exhibit No. 28

CITY OF DOWNEY
8425 SECOND STREET
DOWNEY, CALIFORNIA 90241
MAIL ADDRESS: P.O. BOX 607

October 8, 1974

Mr. Allen E. Pritchard, Jr.
Executive Vice President
National League of Cities
1620 Eye Street, N.W.
Washington, D.C. 20006

Dear Mr. Pritchard,

In response to your inquiry on the impact of the Fair Labor Standards Act, the following departmental responses are submitted:

1. Department of Public Works and Community Development

A. Charges for removing tree limbs and sand bagging flooded areas during storms could increase $4,000. annually.

B. While there may be some increase in costs for constructing the Rose Float, sending a crew to Pasadena and back with the float could cost an additional $1,000. because while there, employees work around the clock New Year's Eve to guard the float.

C. With 50 pre-scheduled evening meetings per year, there will be a $500. increase annually in expenses for secretaries to take minutes.

D. The only administrative change has been in the Water Division where during the summer employees worked nine hours from Monday through Thursday, took every other Friday off, and worked eight hours on alternate Fridays (as follows).

S	M	T	W	T	F	S	
	9	9	9	9			
	9	9	9	9			(36 hrs 1st week)
	9	9	9	9	8		(44 hrs 2nd week)

The work week was changed to begin at noon Friday to come up with 40 hours each week as shown below:

F	S	S	M	T	W	T	F	
4			9	9	9	9	0	(40 hrs 1st wk)
0			9	9	9	9	4	(40 hrs 2nd wk)
4			9	9	9	9	0	(40 hrs 3rd wk)
0			9	9	9	9	4	(40 hrs 4th wk)

2. City Clerk-Treasurer

The Fair Labor Standards Act does not enable the Executive Secretary to the City Clerk to receive overtime pay or compensatory time off for the hours she expends at the evening Council meetings.

The secretary accrues at least three hours monthly for overtime at the night Council meetings. Her normal daily routine duties, which include the transcription of Council minutes, makes it very difficult to give time-off from the job during the week in which the overtime hours took place.

In prior years, it was a simple matter of giving her a half-day off from work at a time of the month when her workload was at a minimum. The F.L.S.A. no longer permits this procedure.

3. Fire Department

A. Collective Bargaining Agreement. It has been the policy in the past years to negotiate agreements to allow Comp Time for holiday accrual. Under FLSA, this process has been disallowed. This makes mandatory payment of overtime a necessity.

B. Scheduling. Public Safety Services require unusual mandatory scheduling schemes. The disruption of work schedules mandated by the Federal Government has caused unnecessary hardship and excessive costs with a direct relation to said law.

Example: Pre-Scheduling allows for a 56 hour work week for a fireman on a 27-day cycle. Under FLSA, the mandatory schedule is 56 hours on a 28-day schedule which precludes the 27-day work cycle. Even though the former is more attractive and complies with most work schedulings in use, FLSA pre-empts this particular field.

C. Training. The detrimental effect of paying time and one-half for training assignments in excess of 40 hours will tend to destroy the employer relationship that has developed through upgrading employees at a standard base rate.

4. Police Department

A. The requirements of FLSA are different from those in our City Personnel Regulations relative to overtime. FLSA has mandated different benefits which should be a negotiable item to be bargained for by the employee bargaining unit.

B. FLSA requires now that when calling in a person to work on one of his regular days off, we are required to pay time and one-half as opposed to the previous practice of straight time.

C. Under the new rules, an employee is not allowed to accumulate overtime. This is a serious morale factor in that many employees prefer to accumulate overtime, to be taken later as compensatory time off.

D. FLSA has forced the abandonment of an extremely effective proposal for 12-hour police dispatcher shifts. The scheduling for such a scheme would have resulted in an employee working less than 40 hours during some weeks and in excess of 40 hours in others. This would result in a lower overall manning cost. Under the new law, the City would be required to pay employees time and one-half for work in excess of 40 hours in each week even though the final month's total work time would be the same as it is presently.

E. The Police Department carries on an effective and extensive training program. Much of this activity is requested by employees in order to increase their effectiveness and promotability. Under FLSA, time and one-half would have to be paid for such training over the 40 hour limit.

F. In changing of shifts in the 24-hour police operation there will be many occasions where a person during the first week of a shift, must work in excess of 40 hours, requiring time and one-half.

We trust these responses will be helpful and wish you well in your endeavor.

Yours very truly,

/s/ Charles W. Thompson
Charles W. Thompson
City Manager

Defendant's Exhibit No. 29

NEW JERSEY STATE
LEAGUE OF MUNICIPALITIES
433 BELLEVUE AVENUE
TRENTON, NEW JERSEY 08618

October 4, 1974

Mr. Allen E. Pritchard, Jr.
Executive Vice President
National League of Cities
1620 Eye Street, N.W.
Washington, D.C. 20006

Dear Allen:

Enclosed is a letter which we received commenting on various aspects of the Fair Labor Standards Act amendments which were signed into law last spring. While some of these battles may have been lost in Congress it may be that some of the decisions relating to police and firemen could still be reached when the guidelines and regulations are drafted to be effective next January 1.

Will you please let me have your response to this letter from the Manager of Randolph Township so that I can forward it on to him.

Very truly yours,

/s/ Bob
Robert H. Fust
Executive Director

TOWNSHIP OF RANDOLPH
MUNICIPAL BUILDING
MILLBROOK AVENUE
RANDOLPH, N.J. 07801

September 30, 1974

Mr. Robert H. Fust
Executive Director
New Jersey State League of Municipalities
433 Bellevue Avenue, Room D-403
Trenton, NJ 08618

Dear Bob:

I have received a report from a member of our staff who attended the conference with respect to the Fair Labor Standards Act sponsored by the League and P.S.I. on September 20, 1974. I am extremely concerned with the information provided at the conference and would urge and recommend that the League organize some specific action to coordinate what I feel will be virtually the unanimous opinion of New Jersey officials in seeking changes in several regulations which I consider to be totally improper. The following are just a few examples of items of this type:

1. It is my understanding that if an individual attends some kind of educational or training sessions which are related to his job, the hours spent for this purpose must be included as part of the 40 hour "work week". I would note that we, and many other municipalities, have existing provisions in labor contracts that provide for incentive payments for advanced education. To include

this time as part of the work week would be in direct conflict with legally established collective bargaining agreements and would force us to discourage advanced education of employees, or perhaps even violate these contracts to avoid exceeding the 40 hour work week.

2. We, any many other municipalities, have existing contract provisions with Police Detectives whereby a flat additional amount of money is provided for Detectives due to the irregular hours which are required. The regulations as explained to date, would again cause the same problem as indicated in paragraph 1 above.

3. Another situation of the same type involves formerly established agreements for payment of court time at either straight time rates or at a flat per diem amount. Once again, if this time is included as part of the normal work week, it would aggrevate existing collective bargaining contracts and tend to hinder and slow up the current backlog of court cases by forcing delays in court appearances by Police Officers to stay within the 40 hour work week.

4. We have a situation in Randolph, which I am sure is common in other communities, whereby certain full time employees serve as the Secretary or Staff Person for volunteer boards and commissions. It has been stated that such service for positions which are unquestionably separate from the normal full time positions of the employee are considered to be "dual employment" and that the combined hours for these positions must be calculated in determining whether an individual has worked 40 hours or more per week. To me, this is completely illogical and will clearly result in a detrimental situation for local governments since there is a clear advantage to having an employee who has some knowledge of Township procedures and some responsibilities on a full time basis provide service to part time boards and committees.

I believe Gerry Dorf could perhaps be involved in some of the above questions which relate to union contracts and that some action on a coordinated basis is needed to indicate the desire for changes in the law as explained to date.

Very truly yours,

/s/ Pete
J. Peter Braun
Township Manager

Defendant's Exhibit No. 30

CITY OF PHOENIX, ARIZONA
PERSONNEL DEPARTMENT

September 20, 1974

Allen E. Pritchard, Jr.
Executive Vice President
National League of Cities
1620 Eye Street, N.W.
Washington, D. C. 20006

Dear Mr. Pritchard:

In response to your questionnaire regarding the impact of the Fair Labor Standards Act on municipalities, please be advised that the principal expected impact for the City

of Phoenix is related to the police and fire services. Since we have not received Department of Labor guidelines yet for the public safety area, we are unable to respond definitively in this area. We will, however, advise you just as soon as possible after we have had an opportunity to review the federal guidelines.

The fiscal impact outside of the public safety area for the City of Phoneix is relatively minimal inasmuch as the City has adopted a number of premium pay practices similar to private industry for a number of years. The principal fiscal change will entail an additional annual expenditure of approximately $100,000 in overtime payments for those persons previously receiving compensatory time off.

Many man hours and efforts are also required to review job classifications and individual positions for coverage under the Act. This task is in process now and as yet we have no determination of wholesale changes required.

Sincerely yours,

/s/ R.W. Galloway
Robert W. Galloway
Personnel Director

Defendant's Exhibit No. 31

CITY OF TULSA OKLAHOMA
OFFICE OF THE MAYOR

September 17, 1974

Mr. Allen E. Pritchard, Jr.
Executive Vice President
National League of Cities
1620 Eye Street, Northwest
Washington, D.C. 20006

Dear Allen:

I have received a request from the Oklahoma Municipal League to forward to you a questionnaire with information regarding the impact of the Fair Labor Standards Act upon the City of Tulsa. The questionnaire does not provide the opportunity to define the particular problems which Tulsa may encounter, however, so I am outlining them here.

There are four areas that will cause problems as far as the City of Tulsa is concerned in the future:

1. Record keeping and control will be a problem for the City because of the variety of work weeks established for city employees and the widely dispersed nature of city departments and functions.

2. Compensatory time off for non-uniformed employees also presents a problem. With the passage of the Fair Labor Standards Act, it will be impossible for the city in the future to provide compensatory time off for non-exempt employees. The law provides that after

the passage of 40 hours within a given work week, employees will be compensated at the rate of tame-and-one-half their regular straight time rates for any hours thereafter.

Because of potential budget limitations, and the strict controls placed upon the financing powers of cities in the State of Oklahoma, it may be necessary to curtail services in order to stay within budget boundaries.

3. We anticipate difficulty with provisions on age discrimination in the Fire and Police Departments. Currently, the Fire and Police Departments have an entry age limitation of 21 to 31. The Fair Labor Standards Act provides that employers cannot discriminate against anyone seeking employment if the person is from age 40 to age 65 and has the physical and mental qualifications for a job. This will inhibit our ability to deny employment to applicants who are between the age bracket of 40 and 65 for the Fire and Police Departments.

This can have a serious effect on the Fire and Police retirement plans, and threatens additional potential liability that can be incurred through on-the-job injury.

4. The final major problem we will face is with the Fire Department work week. The City of Tulsa Fire Department now works a 240-hour work month. Starting January 1, 1976, Fire Department employees who are now working a 24-hour work shift will be working an average of eight hours of overtime per month.

Based on the present manpower head count and wage structure in the Fire Department, we can expect a cost to be incurred by the City of Tulsa for overtime payment of $115,200 per year if we continue on the same basic work schedule we now have. We project an additional impact

of $11,500 per year for retirement and other fringe benefits as results of increased wages to be paid to Fire Department personnel. The total potential cost during 1976 would be $126,700.

Starting in January, 1977, firemen will be dropped to 216 hours per month under the Fair Labor Standards Act. This would result in each fireman in the operational divisions receiving 24 hours of overtime pay per month. The total overtime impact for 1977 will be $380,600.

I hope this information will be helpful in determining whether a challenge will be filed against the act.

Let me add here my personal thanks for your taking the time to participate in the Oklahoma Municipal League's convention here last week. Your contribution to the program was appreciated.

Sincerely,

/s/ Robert J. LaFortune
Robert J. LaFortune
Mayor

Defendant's Exhibit No. 32

CITY OF SUNNYVALE CALIFORNIA
DEPARTMENT OF ADMINISTRATION

October 7, 1974

Mr. Allen E. Pritchard, Jr.
Executive Vice President
National League of Cities
1620 Eye Street N. W.
Washington, D. C. 20006

Dear Mr. Pritchard:

Enclosed is a communication from the Director of Public Safety listing the impact of the FLSA overtime provisions in fire services on the City of Sunnyvale.

The annual cost of the overtime requirements would be $11.78 per hour for officers and $13.60 per hour for lieutenants for calendar 1975; 10% more for calendar 1976; and 10% more for calendar 1977. Translated into work hour dollars the cost in 1975 would be $169,212; in 1976 $186,133 and in 1977 $204,746. The total for all three years would be $560,091. This additional cost is for a lower level of service.

Please note the additional scheduling problems which are as realistic a difficulty as the additional cost. If such legislation had been passed with proper analysis of the mathematics of cycles, a six week cycle should have been used–not the four week. This note is aside from the other considerations voiced.

Sincerely,

/s/ W. T. Hopkins
W. T. Hopkins
Assistant City Manager

CITY OF SUNNYVALE
CALIFORNIA

September 30, 1974

To: Assistant City Manager

From: Chief, Dept. of Public Safety

Subject: Work Hours for Fire Service

In our discussions concerning recent legislation reducing the number of hours that fire service may work during a seven-day peroid, the following information is submitted.

During the calendar year 1975, under the most adverse ruling by the Department of Labor, Sunnyvale would have to provide an additional 13,728 work hours in the fire stations. In 1976, this would increase to 16,016: and in 1977, to 20,259.

Developing the additional man hours required to comply with legislation, however, does not necessarily solve the problem since hours are not necessarily capable of being computed into bodies for proper scheduling. For example, there is no way to schedule a 54-hour week.

My best estimate is that by January, 1977, we would have to have an additional fire shift consisting of six Lieutenants and sixteen Public Safety Officers for a total of twenty-two additional bodies.

/s/ G. K. H.
George K. Hansen

Defendant's Exhibit No. 33

CITY OF CORCORAN
1033 CHITTENDEN AVENUE
CORCORAN, CALIFORNIA 93212
(209) 992-2151

September 25, 1974

Mr. Allen E. Pritchard, Jr.
Executive Vice-President
National League of Cities
1620 "I" Street N.W.
Washington, D.C. 20006

Dear Mr. Pritchard:

The Fair Labor Standards Act of 1974 has in several instances disrupted Municipal Administration and personnel practices within the City of Corcoran. Many of these disruptions have necessitated a shifting of resources. The results of this shifting will be immeasurable as services and community projects are deferred to meet the costs proposed and mandated on the City by the Fair Labor Standards Act.

The City of Corcoran, a community of 6,000 people, located in the southern San Joaquin Valley, has attempted to outline by example, some of the disruptions as they relate to City services and our capabilities to deliver those services.

I. FIRE. Prior to the adoption of the FLSA, the City of Corcoran's Fire Department was comprised of five paid full time personnel and complemented by a

volunteer force of seventeen personnel. We have been able to maintain a fire rating of 4, as deficiencies in the area of personnel were minimal. Scheduling for the department has been done on the basis of a 3 on - 3 off shifting to constitute 183 shifts a year. This shifting has been reached through a meeting/conferring process between the City of Corcoran and the department's association as required by the Meyers-Millias-Brown Act, the State of California's Public Labor Statute. An 84-hour duty week has not been felt, by the department personnel, to be detrimental to their health and safety, because of the small number of responses made by the Department. Under the Fair Labor Standards Act, a mandated reduction of nearly 30% in working hours would result in the following:

1. An increase in the hourly rate of pay by nearly 30%.

2. Necessitate the City employing two additional personnel at an estimated annual cost of $18,000.

3. Reduce the amount of inservice training time available because of the high costs of calling personnel in for overtime for training.

4. Cause remodeling of the City's station, prior to scheduling because the need to house additional personnel.

II. POLICE. Prior to the adoption of the FLSA, the City of Corcoran's Police Department was comprised of 15 full time personnel and complemented by a reserve force of ten. We feel that we have been able to maintain a low crime rate in Part I and Part II offenses because of some donated time on behalf of the men of the department and the reserve force.

The Police Department is also responsible for running and maintaining the City's Ambulance Service on an

overtime basis, but generally ranged at the convenience for the personnel involved. Under the Fair Labor Standards Act, mandated requirements will result in:

1. A reduction in department training, such as weapons' practices, due to the high costs of overtime for personnel called to service.

2. An alteration of ambulance services, because of the overtime requirements in training personnel sufficiently to operate the ambulance.

III. PUBLIC WORKS. Prior to the adoption of FLSA, the City of Corcoran's Department of Public Works was comprised of twenty full time personnel. They are responsible for water, solid waste, sewage, and parks maintenance. The City has been successful in meeting the Environmental Protection Agency's requirements in the areas of sewage treatment and solid waste disposal by maintaining shifting, consistent with available manpower within the Department while remaining consistent to the City's service level requirements. Scheduling for the refuse personnel has been on a 48 hour, 6 days a week basis. This shifting was reached on a meeting/conferring basis between the City of Corcoran and the Department's Association. Premium pay has been paid and an incentive has been provided to the crews who finish their prescribed routes in less than the eight hours duty.

Under the Fair Labor Standards Act, mandated payment requirements will result in:

1. An increase in the hourly rate of pay to refuse department employees by nearly 20%.

2. The necessity to hire two additional personnel at an estimated annual cost of $16,000.

3. The necessity to purchase additional refuse equipment to allow for a rescheduling of routes to meet the 40 hour work week requirement.

IV. GENERAL AREAS. Of the City's 48 employees, 39 are represented by an Association for the purposes of meeting/conferring with the City on issues of wages, hours, and other fringe benefits. The City of Corcoran and the Employees Association, through this meeting/conferring process, have in the past agreed to:

1. Straight time payment for hours worked beyond normal shifting. The adoption of FLSA and the mandating of payment of time and a half for overtime worked is estimated to cost the City an additional $10,000 annually.

2. Leaving to the employee's option to take overtime worked in the form of pay or compensatory time off. With the adoption of FLSA, this option has been taken away from the employees and will result in the additional costs of $5,000 a year to the City.

As previously mentioned, this disruption created by the adoption of FLSA is only partially measurable. It is estimated, by the examples given above, that the FLSA will cost the City annually approximately $49,000 to meet the mandates of the hours and wages provisions. What is immeasurable, is the fact that these costs will:

1. Defer the implementation of designed future services and programs because revenues will not be there to see them implemented.

2. Result in increased utility fees and tax rates to the citizens of Corcoran to meet the FLSA mandates.

Your consideration, to these facts, will be greatly appreciated.

Sincerely yours,

/s/ Thomas I. Smith
Thomas I. Smith
City Manager

Defendant's Exhibit No. 34

CITY OF COLUMBIA
SOUTH CAROLINA

27 November 1974

Mr. N. Alex Bickley, President
National Insitute of Municipal Law Officers
839 – 17th Street, N. W.
Washington, D. C. 20006

Dear Mr. Bickley:

This is in reply to your request for information regarding fire and police services and their status vis-a-vis the FLSA of 1974.

The City of Columbia presently has 216 law enforcement officers and 230 personnel engaged in fire protection service. These figures include all job classes covered under the Act.

This year's budget for personnel services is $2,546,945 for the police department and $2,388,103 for the fire department.

In regards to the police department, we anticipate only a minimum in additional costs and no reduction in service attributable to the Act since we have had a 42 1/2 hour work week in effect for quite some time and were well above minimum wage considerations.

Within the fire department, we have no minimum wage problems, but do anticipate some increase in overtime compensation for the coming year. We anticipate no reduction in service. The following year it will be

necessary for us to put on a minimum of twelve additional firefighters to meet schedule compliance with the Act. This would mean an estimated annual increase of approximately $110,000.

One prime area that is likely to suffer within both our fire and police departments is in training. Since all job related training is compensible, and since training programs are difficult to arrange during scheduled work hours for these departments, decreased in-service training is a likely result.

This of course is just as damaging in the long run, and mitigates efficiency of these departments just as much as an outright decrease in service.

No firm determination has been made as yet as to the method for raising revenues to meet these new costs. In relation to the inflationary picture the FLSA will register an annoying, but certainly lesser problem with us. The combined effect, however, most likely will result in an ultimate tax increase.

Thank you for the opportunity to voice our concern.

With kindest regards.

Sincerely,

/s/ Kenneth L. Westmoreland
Kenneth L. Westmoreland
Administrative Assistant

Defendant's Exhibit No. 35

CITY OF RICHMOND
DEPARTMENT OF LAW
RICHMOND, VIRGINIA 23219

December 5, 1974

Mr. Charles S. Rhyne
National Institute of Municipal
Law Officers
839 17th Street, N. W.
Washington, D. C. 20006

Dear Charlie:

Attached please find copy of Alex's letter to all municipal attorneys dated November 18, 1974 concerning FLSA. You will note that I have supplied the information opposite each question asked.

I hope this will be of some help.

Sincerely,

/s/ Conard
C. B. Mattox, Jr.
City Attorney

NATIONAL INSTITUTE OF
MUNICIPAL LAW OFFICERS
839 - 17th STREET, N.W.
WASHINGTON, D.C. 20006
[202] 347-7996

November 18, 1974

Dear Municipal Attorney:

As you are aware, one of the subjects presented at the recently conducted NIMLO Conference in San Diego was the constitutionality of the 1974 Amendments to the Fair Labor Standards Act. Mr. Thomas M. Utterback, City Attorney of Cape Girardeau, Missouri, in his presentation, stated with respect to possible court challenges:

> "Far too long, states have shirked their obligations, and it is that vacuum the Federal Government has filled. For this reason, it is important to have a substantial record based on testimony from real live people as to the nature of state and/or local government and the impact of FLSA '74 on state and local government."

The National League of Cities is presently in the preparation stages of a challenge to the constitutionality of the 1974 Amendments to the Fair Labor Standards Act. We need factual information which would clearly illustrate fiscal impact or trade-offs which must now be made by cities due to application of the FLSA. Charles S. Rhyne has been chosen by the National League of Cities as Counsel in their action.

Of paramount interest is the following information regarding fire and police protection services. Figures should be estimated and computed without regard for the as yet unpublished regulations.

1. The number of police presently employed. 572

2. The number of firemen presently employed. 523

3. The amount presently budgeted for police. $8,998,700

4. The amount presently budgeted for firemen. $7,149,000

5. The estimated increase in amount due to the FLSA amendments for police. None

6. The estimated increase in amount due to the FLSA amendments for firemen. $161,000 for period 1/1/74 – 6/30/75 (20 additional firefighters)

7. The sources of necessary increases in revenues to meet these new costs, i.e., the amounts which will come from:

a. decrease in police personnel
b. decrease in firemen personnel
c. elimination of other government services
d. any other source Unappropriated reserve

Any additional experiences regarding fiscal organizations as required by FLSA of functions which only government can perform would be appreciated. Include the same information as above, being sure to state the number of employees, and annual amounts affected with as much specificity as possible.

Your prompt attention is appreciated.

Sincerely,

/s/ N. Alex Bickley
N. Alex Bickley
President

Defendant's Exhibit No. 36

CITY OF REIDSVILLE
MUNICIPAL BUILDING
220 WEST MOREHEAD STREET
NORTH CAROLINA 27320

December 2, 1974

Mr. N. Alex Bickley, President
National Instutute of Municipal Law Officers
839 – 17th Street, N. W.
Washington, D. C. 20006

Dear Mr. Bickley:

In response to your letter of November 18, 1974, we have calculated the following:

I. Police Department: Number of policemen presently employed – 40

The amount presently budgeted for police –

a. Patrol Division – $282,085.00 Salaries
– $356,049.00 Total
b. Traffic Division – $ 24,684.00 Salaries
– $ 98,384.00 Total

The estimated increase in amount due – 2.5 overtime hours/week/man or $33,567.84.

Sources to meet these new costs – funds would have to be transferred from the General Fund or Revenue Sharing to the Police Department's line items, placing a great hardship on the City.

II. Fire Department: Number of firemen presently employed – 22

The amount presently budgeted for fire –

a. Salaries $193,629.00
b. Total $270,584.00

The estimated increase in amount due – the City would be caused to employ three (3) additional firemen at a cost to the City of $30,635.00 placing an additional hardship on the budget to that indicated above.

Sources to meet these new costs would be the same as above.

If we can be of additional help please feel free to contact us.

Sincerely yours,

/s/ Charles K. Beck
Charles K. Beck
City Manager Intern

Defendant's Exhibit No. 38

BYRLEY, CHARLES A. – Biographical Sketch
[as of October, 1974]
Born and reared: Corbin, Kentucky
Undergraduate and graduate work: University of Kentucky
Kentucky State Government (10 years):
Deputy Commissioner of Finance;
Deputy Commissioner of Highways;
Deputy to the Governor
Council of State Governments (6 years; Chicago, Illinois):
Director, Midwestern Office;
Secretary-Treasurer, Midwestern Governors' Conference;

Executive Secretary, National Association of State Budget Officers;
Executive Secretary, National Association of State Purchasing Officials;
Secretary-Treasurer, National Conference of Lieutenant Governors
*Director of Federal-State Relations, National Governors' Conference (Washington, D. C.): March, 1967, to March, 1974
*Director, Washington Office, Council of State Governments: July, 1968, to June, 1974
Executive Director, National Governors' Conference, Washington, D. C.: March, 1974, to present [1150 Seventeenth Street, N.W., Washington, D. C. 20036 Telephone: 202/785-5600]

Additional information available upon request.

*Positions held concurrently.

Defendant's Exhibit No. 39

WYOMING
EXECUTIVE DEPARTMENT
CHEYENNE

December 20, 1974

Mr. Charles A. Byrley
Executive Director
National Governor's Conference
1150 Seventeenth Street, N.W.
Washington, D. C. 20036

Dear Charlie:

I must formally express my concern with respect to the negative budgetary impact recent amendments to the Fair Labor Standards Act have brought to bear upon the State of Wyoming.

It is clear that inadequate attention was given by Congress with respect to the disruptive effect the subject changes would have on State Personnel management systems.

Even more apparent is the significant increase in costs associated with the requirement that additional classes of public employees have been made eligible for overtime pay. At the State level, the unanticipated cost of expanded overtime pay coverage will equal $2,415,103 for the period May 1, 1974, through the fiscal biennium 1975-77. At a time when state agency budget requests exceed projected revenues, it is disheartening to have additional burdens placed upon our fiscal apparatus. The

failure of Congress to weigh carefully the financial repercussions of the broadened overtime pay requirements will operate to bring undue hardships upon the State at a most inappropriate time; obviously the effect upon local governments most of which are confronted with limited financial resources will be equally apparent.

Needless to say, the fact the effective date of coverage, May 1, 1974, does not coincide with the State's budget/appropriation cycle beginning in July of each biennium hampers our ability to comply immediately with the revised provisions of the Act.

You have my support in any effort you undertake to redress this situation.

With best regards, I am

Sincerely yours,

/s/ Stan Hathaway
Stan Hathaway
Governor

Defendant's Exhibit No. 40

STATE OF MARYLAND
EXECUTIVE DEPARTMENT
ANNAPOLIS, MARYLAND 21404

December 20, 1974

Mr. Charles A. Byrley, Director
Office of Federal-State Relations
National Governors' Conference
1150 - 17th Street, N. W.
Washington, D. C. 20036

Dear Mr. Byrley:

Mr. Edmond Rovner of the National Governors' Conference recently requested that I make available to you certain information concerning the implementation of the Fair Labor Standards Act enacted by the Congress in July 1974. Specifically, Mr. Rovner was concerned with the impact of the overtime provisions of the Fair Labor Standards Act on State governments and State budgets.

I have been informed by the Maryland Department of Personnel that overtime regulations governing Maryland's State employees substantially conform with the provisions of the Fair Labor Standards Act relating to overtime compensation. Accordingly, the effect of that Act on the Maryland State budget will not be as great as the effect on the budgets of many other States. It is our judgment that full compliance with the overtime provisions of the Fair Labor Standards Act will result in

an additional annual expenditure of approximately $2.25 million.

If you have any further questions regarding this matter, I suggest that you contact Secretary Henry Bosz of the Maryland Department of Personnel.

Sincerely,

/s/ Marvin Mandel
Marvin Mandel
Governor

Defendant's Exhibit No. 41

EXECUTIVE OFFICE
STATE OF MISSOURI
JEFFERSON CITY

October 28, 1974

Mr. Terry Smith
National Governors' Conference
Office of Federal-State Relations
1150 Seventeenth Street, N.W.
Washington, D. C. 20036

Dear Mr. Smith:

Governor Bond has asked me to reply to your special letter regarding the proposed Department of Labor rule concerning salary levels to be used for minimum wage exemptions.

The Missouri Department of Labor and Industrial Relations surveyed departments of the executive branch representing 46 percent of the state's total work force. The survey encompassed personal service wage rates for the "Executive/Administrative" and "Professional" categories funded by state revenues.

Of the group surveyed, there were 1181 employees classified in the affected categories and salary ranges. The annual monetary impact of the proposed rule change for this group would amount to approximately $1.5 million. Extrapolation of this dollar amount indicates the total monetary impact upon State revenues for all personal services would be in excess of $3.1 million annually, depending upon the wage rate spread utilized.

Governor Bond is concerned, in an era of announced "belt-tightening" by the President, that the dollar impact noted above will run contradictory to the goal of reducing inflation. The timing of this six-month study is simply, inappropriate. In this instance, rather than eliminating outmoded government regulations to spur savings, which is being urged by the President, the opportunity exists to table a potentially expensive study.

These financially troubled times dictate prudence and constraint at all levels. In our estimation, this proposed study should be postponed.

Sincerely,

/s/ Perry A. Roberts
Perry A. Roberts
Executive Assistant

Defendant's Exhibit No. 42

STATE OF ARKANSAS
DEPARTMENT OF FINANCE AND ADMINISTRATION
P.O. BOX 3278
LITTLE ROCK 72203

November 7, 1974

Mr. Charles A. Byrley
National Governors' Conference
Office of Federal-State Relations
1150 Seventeenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Byrley:

The U.S. Department of Labor's proposed wage rate changes for executive, administrative, and professional employees would impose a tremendous financial burden on the State of Arkansas. Many employees who are now exempt would become subject to overtime.

These employees are in responsible positions and are expected to work as long as necessary to get the job done. The responsible nature of their work meets all of the current tests for exemption.

The result of the higher wage rates would be to divert funds from a general pay increase, now being proposed for all employees, to the management and professional employees who would work in excess of forty hours a week if they determined extra hours were necessary to accomplish their objectives.

The only other alternative would be to limit these employees to forty hours a week with a consequent lessening of public services. A time limit on these key employee's productivity would cause critical situations to develop in their relations with the public and reduce the availability of their expertise during the budget process prior to and during sessions of the Legislature.

We are working very hard to bring state employee's salaries up to a level that is competitive within both the state and the region. Arbitrary salary adjustments such as those being proposed serve only to disrupt orderly salary gains for all employees and make efficient and equitable salary administration almost impossible.

We are willing to provide your office with any support necessary to prevent a change in the existing wage rates.

Sincerely,

/s/ Richard R. Heath
Richard R. Heath
Director

Defendant's Exhibit No. 43

STATE OF FLORIDA
OFFICE OF GOVERNOR REUBIN O'D. ASKEW

December 20, 1974

Mr. Charles Byrley
National Governor's Conference
1150 17th Street, N. W.
Washington, D. C. 20036

Dear Mr. Byrley:

We have been requested by your office to submit information as to the financial effects of the coverage of the Federal Fair Labor Standards Act on the State of Florida.

While you recognize that a definite dollar figure would be difficult to substantiate in detail on such short notice we do know that the cost is substantial and the amounts presented herein are our best estimates at this time.

A relatively minor area of coverage relates to the patients working in our hospitals and mental institutions. The Florida Legislature appropriated $500,000 for the seven month period of December 1 through June 30 for this purpose. After much review, we find that this appropriation falls far short of the cost in this area if we are to fulfill the therapeutic needs of the patients and at the same time comply with the Act. Adequate funding of this much needed program with the restaint placed on the state by the Act would require at least $1,625,000 annually.

Federally mandated recordkeeping costs under the Act are substantial. This cost is estimated at $800,000 annually.

Overtime provisions of the Act have caused more expense to state government than any other section. On such short notice we are unable to compile this figure but Mr. Henry Anderson, Fair Labor Standards Coordinator will call you Monday morning with the amount.

Needless to say, the Federal Fair Labor Standards Act has placed a restraint on state government that interferes with our budgeting process and jeopardizes the state's ability to establish policies that are in the best interest of the citizens of the State of Florida.

If we can furnish any additional information, please let us know.

Sincerely,

/s/ Reubin Askew
Reubin O'D. Askew
Governor

Defendant's Exhibit No. 44

OFFICE OF THE GOVERNOR
STATE CAPITOL
DES MOINES, IOWA 50319

December 19, 1974

Mr. Charles A. Byrley
Executive Director
The National Governors' Conference
1150 Seventeenth Street N.W.
Washington, D.C. 20036

Dear Charlie:

This letter is in response to an inquiry today from your office on the impact regarding the 1974 amendments to the Fair Labor Standards Act on the budget of Iowa state government.

The major areas where the amendments will have an effect are the provisions for time and one-half compensation for hours worked over 40 hours per week and also the requirement of a minimum wage for patients who work as part-time help in our social service institutions.

Our budget analysts in the Office of the State Comptroller advise me that these provisions in the amendments will require additional state expenditures of from $3 million to $3.5 million annually.

These additional costs to state government come at a time when we are already in a very tight budget situation.

Best regards.

Sincerely,
/s/ R. D. Ray
Robert D. Ray
Governor

Defendant's Exhibit No. 45

STATE OF VERMONT
EXECUTIVE DEPARTMENT
Montpelier, Vermont

December 20, 1974

Mr. Charles Byrley
Executive Director
National Governors' Conference
1150 Seventeenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Byrley:

This is in response to your request for an estimate of the current and future fiscal impact of the 1974 Fair Labor Standards Act amendments on Vermont state government. My administration is still taking steps to implement the provisions of the 1974 amendments, and some of the figures which I will quote to you are at this time only estimates. It is almost impossible to estimate the full future impact. Nevertheless, I will try to fulfill your request.

The increase in the minimum wage will have very little impact. At the current time the State of Vermont is in compliance with the minimum wage provisions of the Fair Labor Standards Act. We will have to raise the minimum wage beginning January 1, 1976, in order to comply with the 1976 minimums. These minimums would probably have been raised even without the Fair Labor Standards Act requirements, so, in all fairness, I

must say that the minimum wage provisions of the amendments have had little or no effect on the State as an employer.

It is in the maximum hours (overtime) sections of the law that very serious fiscal problems arise. The impact is felt both in increased personal services payments (i.e., higher overtime rates) and in administrative costs. So far, our Department of Highways has paid $100,000 to its district employees as retroactive payment for overtime worked since May 1, 1974. It is estimated that the Department of Highway's overtime costs in all of fiscal year 1975 will be about $200,000 higher than anticipated as a direct result of the new overtime provisions of the Fair Labor Standards Act. Other unanticipated retroactive FY '75 payments which will have to be paid to employees in other agencies of state government so far have amounted to approximately $10,000.

Another potentially large obligation which was completely unanticipated prior to passage of the Fair Labor Standards Act amendments is in the area of earned compensatory time. During the course of FY '75 it is anticipated that, under the provisions of the contract between the State and the employees' union, employees will voluntarily choose to take about 60,000 hours of their earned overtime in compensatory time off rather than cash. If the Department of Labor rules that the State must pay employees for all overtime hours worked in cash rather than allow them to take 60,000 hours in time off, it will increase our cash overtime obligation by approximately $330,000 in FY '75.

Another potential expense which is now pending is a lawsuit brought by some State employees on the basis of the Fair Labor Standards Act which, if the State loses, could cost the State a total of $250,000 more in overtime payments and damages.

As a result of the record-keeping requirements of the Fair Labor Standards Act, the State finds that it is now required to update data processing procedures and forms. New computer programs must be written to comply with Fair Labor Standards Act requirements, and new forms must be printed. The additional unanticipated expense to the State in terms of time, material, and computer costs are estimated at $35,000.

Summing up the actual impact in FY '75, we find the following:

$200,000 – Department of Highway's overtime costs
10,000 – Other agency overtime costs
35,000 – Administrative costs
$245,000 – Actual FY '75 cash impact to date

Furthermore, depending on court decisions and Department of Labor interpretations, the State could also be liable in FY '75 for the following:

$330,000 – Compensatory time cash reimbursement
250,000 – Employee overtime lawsuit
$580,000 – Total potential additional expenses
+245,000 – Actual cash outlay
$825,000 – Grand Total potential FY '75 impact

While the figures noted above are of great concern to me, in a State which, like all others, is in the midst of severe economic and budgetary problems, my concerns for the impact of the law on our future operations are at least as great. For instance, we must hire attorneys on a

contractual basis to defend the State against FLSA lawsuits which can be and are being brought by individual employees, labor unions, or the Department of Labor itself. I cannot reasonably estimate what these service fees might be, although $100 an hour for attorneys' fees, as you know, is not uncommon in the labor relations field. The cost of renegotiating contracts which have been invalidated in part by the Fair Labor Standards Act is very expensive in terms of time and material. It is impossible to place a dollar figure on this factor.

The State may also face additional substantial costs in retroactive overtime pay for certain irregularly scheduled employees such as cottage parents and park managers. In addition, depending on the regulations which the Department of Labor issues this month on law enforcement and fire protection personnel, the State could stand to incur even higher overtime costs, particularly for game wardens and certain airport firemen.

In summary, the Fair Labor Standards Act amendments have had substantial immediate fiscal impact and could have even more wide-ranging fiscal as well as programmatic and philosophic impact on State operations.

I hope these estimates and comments are of some help to you. If I can be of any more assistance, please contact me at any time.

Sincerely,

/s/ Thomas P. Salmon
Thomas P. Salmon

Defendant's Exhibit No. 46

STATE OF WASHINGTON
OFFICE OF THE GOVERNOR
OLYMPIA

November 15. 1974

The Honorable Peter J. Brennan
Secretary of Labor
Department of Labor
Room 3136
14th Street and Constitution Avenue
Washington, D.C. 20210

Dear Mr. Brennan:

The Wage and Hour Division of the Department of Labor will hold a public hearing on Monday, November 18, 1974, to receive testimony concerning regulations to implement the Fair Labor Standards Amendment of 1974. These regulations could have a substantial and a very damaging effect on the services of volunteer fire departments in the State of Washington. I will be grateful to you for your assistance in making known to the Division my views on this matter.

There are over 16,000 Washington citizens who serve as volunteer firemen, providing essential protection and care to their fellow citizens throughout the state. These volunteers respond to emergency calls for fires, and more recently, under the Emergency Medical Assistance ("Medic I") Program. They make themselves available for training and organizational meetings; in some areas they

remain in firehouses through the dangerous nighttime hours, ready to respond to any emergency.

Under the proposed revised regulations, these volunteers would be denied the opportunity to serve. The fire districts which have found it possible to rely upon their services would have to make alternative arrangements. Enormous increases in cost would follow any attempt to maintain existing levels of fire protection, or, even worse, large areas of the state would be left without vital services. Furthermore, I can find no evidence of any volunteer firemen in Washington State requesting the remuneration that is being suggested.

Most seriously though, the traditional concern of Americans for their neighbors in times of need will be denied, while volunteer fire departments will be forced to curtail their services and pay wages, which represent a serious financial burden while still falling far below the rate of earnings which the volunteers receive in their regular employment.

I do not believe this misplaced concept of "fairness" could have been the intent of Congress in the 1974 Amendments to the Fair Labor Standards Act. I hope the regulations issued by the Labor Department will make clear that fire departments may make arrangements for the participation of volunteers in fire prevention and related activities without violating the Fair Labor Standards Act and the Amendments of 1974

Thank you for your assistance in making these views known to the Wage and Hour Division.

Sincerely,

/s/ Daniel J. Evans
Daniel J. Evans
Governor

Defendant's Exhibit No. 47

December 23, 1974

Mr. Charles Byrley, Executive Director
National Governors' Conference
1150 - 17th Street, N.W.
Washington, D. C. 20036

Dear Charlie:

Enclosed find the estimated impact of the 1974 amendments to the Fair Labor Standards Act insofar as the operation of Utah State Government is concerned.

These figures were prepared by the Utah State Department of Finance for your use in the deposition you will be giving in support of the complaint for declaratory judgment to which the National Governors' Conference is a party.

Sincerely,

/s/ Galvin L. Rampton
Governor

FEDERAL MINIMUM WAGE ACT
OF 1974 – IMPACT ON STATE GOVERNMENT

UTAH

Highway Department	$671,400
University & Colleges	454,400
Highway Patrol	260,100
Natural Resources	733,500
All Other Departments	100,000
	$2,219,400

Defendant's Exhibit No. 48

STATE OF CALIFORNIA
GOVERNOR'S OFFICE
SACRAMENTO 95814

December 23, 1974

Mr. Charles A. Byrley
Executive Director
National Governors' Conference
1150 17th Street, N.W.
Washington, D.C. 20036

Dear Charlie:

The State of California supports the action of the National Governors' Conference in joining with the National League of Cities to pursue a constitutional law suit alleging that the 1974 Fair Labor Standards Act amendments are improper and will result in serious financial impact upon state and local governments. Further, we support and commend the additional effort to seek an injunction against implementation of the law until the constitutional question is answered.

As you perhaps know, the State of California has provided the Department of Labor with substantial information on the impact that implementation of the FLSA would have on our state. I am most disappointed to find that virtually none of our suggestions have been accepted, and I am particularly concerned that the proposed regulations do not exempt mutual aid services from the overtime provisions of the wage and hour portions of the law.

We are estimating that the cost for the State of California to implement the 1974 Fair Labor Standards Act amendments will be approximately $16,000,000. Wage and hour provisions, and overtime pay and procedures could result in considerably higher costs to the State.

I must inform you, in reading the proposed regulations to implement the FLSA, I was surprised to find that an "Inflationary Impact Report" was not included. In President Ford's "Whip Inflation Now" (WIN) Speech, he stated that all new regulations and legislative enactments would have to be accompanied by an "Inflationary Impact Report". I applauded this action by the President because I firmly believe the government must lead the fight on inflation and set the example. This, however, does not appear to be the case with the 1974 Fair Labor Standards Act amendments.

We are certain that the inflationary impact of the proposed regulations now slated to go into effect on January 1st are so massive as to be difficult to measure. This is just another example of the citizenry bearing additional costs for government services without concurrent increases in the level or quality of services rendered. I feel it is essential that every effort be made to obtain an injunction against implementation of the FLSA amendments so that not only the constitutional question can be answered, but also so that an "Inflationary Impact Report" can be prepared, as required, so that it can be seen, in perspective, what effect these regulations will have on the economy of all 50 states and every local government.

The State of California has great concerns and major reservations about the amendments to the Fair Labor

Standards Act of 1938 and to the propriety of the Federal Government attempting to mandate on other levels of government decisions that rightfully are, and ought to be, made by their own elected officials. We are accutely aware of the impact that these regulations will have on the State of California, and continue to oppose the implementation of same.

Sincerely,

/s/ Ronald Reagan
Ronald Reagan
Governor

Plaintiff's Exhibit No. 1

BIOGRAPHICAL DATA

Name:

Allen E. Pritchard, Jr.

Residence:

627 Goldsborough Drive, Rockville, Maryland 20850

Telephone: (301) 762-1856

Office:

1612 K Street, N.W., Washington, D.C. 20006

Telephone: (202) 293-6915

Born:

June 2, 1921 at Niles, Ohio. Parents – Allen E. and Olive V. Pritchard (retired)

3712 Kay Place, Sarasota, Florida

Married:

April, 1944 to Mary Louise Zeller, Niles, Ohio – parents deceased

Children:

Allen E., III, 27; Mary Lou, 25; Elizabeth Ann, 23; Joseph Z., 14

Education:

Niles McKinley High School, Niles, Ohio

Miami University, Oxford, Ohio – 2 years

University of Colorado, Boulder, Colorado – 2 years – B.A., Economics and Political Science

University of Colorado, Boulder, Colorado – 38 quarter hours toward Master's Degree in Public Administration and 20 additional quarter hours in undergraduate courses

Military Service:

Air Force, World War II – October 28, 1942 – March 8, 1946. 23 months service in South Pacific. Discharged as a Staff Sargeant.

Occupational Experience:

Colorado Municipal League, Boulder, Colorado, Research Assistant
February, 1947 – June, 1947

Colorado Municipal League, Boulder, Colorado, Executive Secretary
June, 1947 – April, 1948

League of Wisconsin Municipalities, Madison, Wisconsin, Assistant Executive Secretary
April, 1948 – September, 1952

Ohio Municipal League, Columbus, Ohio, Executive Director
September, 1952 – September, 1955

League of Kansas Municipalities, Topeka, Kansas, Executive Director
September, 1955 – February, 1960

Municipal Manpower Commission, Washington, D.C., Staff Director
February, 1960 – April, 1962

United States Senator James B. Pearson of Kansas, Administrative Assistant
April, 1962 – August, 1965

Joint Council on Urban Development (National League of Cities – U.S. Conference of Mayors) Administrator
November, 1965 – September, 1966

National League of Cities, Assistant Executive Director and Director of Congressional Relations,
September, 1966 – February, 1970

National League of Cities, Deputy Executive Vice President
February, 1970 – June, 1972
National League of Cities, Executive Vice President
July, 1972 – present

Publications:
Editor – Colorado Municipal Journal, Ohio Cities and Villages, Kansas Government Journal;
Associate Editor – Nation's Cities;
Author – numerous technical papers and articles on American local government

Special Assignments:
Member – Nixon Transition Task Forces on: Intergovernmental Fiscal Policy; Public Welfare; Housing and Urban Renewal
November, 1968 – January, 1969
Member – HEW Task Force on HEW Interagency and Interprogram Relations
February, 1969
Chairman – HUD Task Force on Model Cities
March, 1969

Affiliations:
Phi Kappa Tau Fraternity (president and graduate advisor); Inter-fraternity Council; Kiwanis, Columbus, Ohio; Rotary, Topeka, Kansas; Executive Committee, American Municipal Association (now National League of Cities), 1955-1958; Methodist; Mason.

Hobbies:
Golf and camping

Joint Exhibit No. 4(c): (39 Fed. Reg. 44141)

FRIDAY, DECEMBER 20, 1974

WASHINGTON, D.C.

Volume 39 ■ Number 246

PART III

DEPARTMENT OF LABOR

Wage and Hour Division

BEST COPY AVAILABLE

Employees of Public Agencies Engaged in Fire Protection or Law Enforcement Activities (Including Personnel in Correctional Institutions)

Title 29—Labor

CHAPTER V—WAGE AND HOUR DIVISION

PART 553—EMPLOYEES OF PUBLIC AGENCIES ENGAGED IN FIRE PROTECTION OR LAW ENFORCEMENT ACTIVITIES (INCLUDING SECURITY PERSONNEL IN CORRECTIONAL INSTITUTIONS)

The Fair Labor Standards Act of 1938 (52 Stat. 1060, as amended, 29 U.S.C. 201 et seq.), as amended by the Fair Labor Standards Amendments of 1974 (Pub. L. 93-259), 88 Stat. 55), extends the Act's minimum wage, overtime, equal pay and recordkeeping requirements to most public agency employees. In the case of certain public agencies (i.e., those having employees engaged in fire protection and law enforcement activities, including security personnel in correctional institutions), application of the Act's overtime provisions was delayed until January 1, 1975. This delay was accomplished by new section 13(b)(20) which provided an interim overtime exemption for all such employees regardless of the size of the employing public agency. Effective January 1, 1975, however, the section 13(b)(20) exemption will, by its express terms, be limited to fire protection and law enforcement employees who are employed by a public agency which has, during the workweek, less than five employees so engaged. For larger public agencies having such employees, the Act provides, in section 7(k), a partial overtime exemption which, by its express terms, becomes effective January 1, 1975. These two sections are self-executing and do not depend upon administrative rules or regulations.

On May 17, 1974, however, the Acting Administrator of the Wage and Hour Division, United States Department of Labor, recognizing the need for the issuance of guidelines for interpreting the new and unique overtime exemptions relating to these public agency employees, published in the FEDERAL REGISTER (39 FR 17596) notice of a hearing scheduled for June 3, 1974, to obtain evidence and receive comments regarding the duties, customs, practices, and working conditions of such employees.

The public hearing, which was held as scheduled on June 3, 1974, lasted two full days, during which time 11 individuals and organizations testified and 143 related exhibits were made a part of the hearing record.

Thereafter, on October 30, 1974, the Administrator of the Wage and Hour Division, after reviewing the hearing record in light of the express language and legislative history of the sections 7(k) and 13(b)(20) exemptions, issued proposed regulations (29 CFR Part 553), defining "employees engaged in fire protection and law enforcement activities" and prescribing tentative guidelines for determining hours worked, the work period and tour of duty, and caused the proposed regulations to be published in the FEDERAL REGISTER (39 FR 38663).

The proposed regulations as thus published invited interested persons to submit written comments, suggestions, data or arguments in regard to them on or before December 2, 1974, and, in addition, scheduled a further public hearing for November 18, 1974. In order to give as wide publicity as possible to all affected public agencies, copies of the proposed regulations were mailed directly to the governors of all 50 States, with informational copies going to every State Attorney General and State Fire Marshal, each of whom was requested to bring the proposed regulations to the attention of interested State and local government officials. In addition, approximately 800

copies of the proposed regulations were mailed to individuals, labor organizations, employer organizations, State and local government officials and agencies, as well as to members of the United States Congress.

The further public hearing, announced in the FEDERAL REGISTER on November 1, 1974, was held in Washington, D.C., on November 18–21, 1974, for the purpose of receiving oral suggestions, proposals and comments on the proposed Part 553 from interested persons. Thirty-eight individuals and organizations testified at this second hearing and approximately 300 related exhibits were made a part of the hearing record, which, along with the June 1974 hearing record, is on file with the Chief, Branch of Wage-Hour Standards, Wage and Hour Division, United States Department of Labor, Room 1107, 711 14th Street, NW., Washington, D.C. 20210.

A thorough analysis of all testimony and written material received in connection with the November 1974 hearing has been made, again in conjunction with the express statutory language and pertinent legislative history. This analysis indicated the desirability of making certain changes and additions in 29 CFR Part 553, as proposed, as well as adding new sections to it for the purpose of calling attention to the existence of other Fair Labor Standards Act exemptions which might be available to public agencies affected by new Part 553, as well as to the Act's recordkeeping requirements which are applicable to all covered employers. Other changes in proposed Part 553 expand the term "any employee in fire protection activities" to include employees of forestry conservation agencies who spot forest or brush fires and help in their extinguishment along with other individuals who are called upon to assist

during periods of emergencies and high fire danger. Similarly, the term "any employee in law enforcement activities" has been expanded to include "border patrol agents," and modified to indicate that fish and game wardens and criminal investigative agents assigned to such offices as those of a district attorney may be engaged in such activities, depending upon the particular facts. Both of the foregoing terms have been further expanded to indicate that bona fide fire protection and law enforcement employees will not lose their exempt status when they perform "support activities" on a rotational assignment for training or familiarization purposes, or for other reasons due to illness, injury or infirmity; the requirement that law enforcement officers be sworn has been deleted, as has the requirement for completed training. The sections dealing with training (§ 553.7), secondary and joint employment (§ 553.9), volunteers (§ 553.11) and "comp time" (formerly § 553.17 and now § 553.19) have been further clarified, and a new section has been added to explain the general rules for determining compensable hours of work. Numerous other minor changes have been made but they are not discussed in this preamble since they can be readily discerned by comparing the proposed Part 553 with the version now to be issued. It was suggested that changes be made in the current definitions of executive, administrative or professional employees, and these suggestions, although not germane to the section 7(k) or 13(b)(20) exemptions, will be considered when 29 CFR Part 541 is reissued. The arguments criticizing the subsections dealing with mutual aid agreements (§ 553.10) and sleep and meal time (§ 553.15) were carefully considered. No substantive changes were made, however, because these subsections restate

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legal requirements which cannot be waived or altered by any official of the Department of Labor. Numerous other arguments were directed to the inflationary or cost impact of Part 553. Whatever impact there is, however, is the result of the 1974 Amendments, which, after Congress had considered these same arguments, expressly extended overtime protection to employees engaged in fire protection and law enforcement activities. Moreover, the extent to which the Act will have a cost impact on such public agencies depends, in large part, upon which of the several alternatives open to them the State and local jurisdictions elect to use. Assuming that all jurisdictions elect section 7(k), without any modification in the present tours of duty, the estimated cost impact of the extension of the Act's overtime requirement for calendar year 1975 is estimated to be $27 million for all such jurisdictions.

In issuing Part 553, it is recognized that the Secretary of Labor has been directed by the 1974 Amendments to conduct a study in calendar year 1976 of the hours ordinarily worked by fire protection and law enforcement employees, and to publish the results thereof in the FEDERAL REGISTER (88 Stat. 61). Now, therefore, pending completion of such study or studies, the final version of Part 553 is hereby adopted on an interim basis to read as follows:

Sec.
553.1 Statutory provisions.
553.2 Purpose and scope.

EMPLOYEES ENGAGED IN FIRE PROTECTION AND LAW ENFORCEMENT ACTIVITIES (INCLUDING SECURITY PERSONNEL IN CORRECTIONAL INSTITUTIONS)

Sec.
553.3 Fire protection activities.
553.4 Law enforcement activities.
553.5 20-percent limitation on nonexempt work.
553.6 Public agency employees engaged in both fire protection and law enforcement activities.

Sec.
553.7 Employees attending training facilities.
553.8 Ambulance and rescue service employees.
553.9 Fire protection or law enforcement employees who perform unrelated work for their own agency or for another public agency or private employer.
553.10 Mutual aid.
553.11 Fire protection and law enforcement volunteers.

RULES FOR DETERMINING THE TOUR OF DUTY, WORK PERIOD AND COMPENSABLE HOURS OF WORK

553.12 General statement.
553.13 Tour of duty.
553.14 General rules for determining compensable hours of work.
553.15 Sleeping and meal time as compensable hours of work.
553.16 Work period.
553.17 Early relief.
553.18 Trading time.
553.19 Time off for excess hours or so-called "comp time."
553.20 The "regular rate."
553.21 Records to be kept.

AUTHORITY: Secs. 1-19, 52 Stat. 1060, as amended; 88 Stat. 60; (29 U.S.C. 201-219).

§ 553.1 Statutory provisions.

(a) In extending coverage to certain public agency employees, the Fair Labor Standards Act (hereafter the Act), by virtue of section 13(b)(20), provided a complete overtime exemption for any employee of a public agency who is engaged in fire protection or law enforcement activities (including security personnel in correctional institutions) during the period between the effective date of the 1974 Amendments (May 1, 1974) to and through December 31, 1974. Beginning January 1, 1975, however, this complete overtime exemption may be claimed only with respect to "any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in

any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than five employees in fire protection or law enforcement activities, as the case may be."

(b) Beginning January 1, 1975, public agencies not qualifying for the complete overtime exemption provided in section 13(b)(20) will be required to pay overtime compensation to their fire protection and law enforcement employees on a workweek basis as required by section 7(a) of the Act unless they elect to take advantage of the partial overtime exemption provided in section 7(k) which applies, not on a workweek basis, but on a work period basis, as follows:

• • • No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

(1) In a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed 240 hours; or

(2) In the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 240 hours bears to 28 days, compensation at a rate of not less than one and one-half times the regular rate at which he is employed.

(B) Effective January 1, 1976, section 7(k) is amended by striking out "240 hours" each place it occurs and inserting in lieu thereof "232 hours".

(C) Effective January 1, 1977, such section is amended by striking out "232 hours" each place it occurs and inserting in lieu thereof "216 hours".

(D) Effective January 1, 1978, such section is amended—

(i) By striking out "exceed 216 hours" in paragraph (1) and inserting in lieu thereof

"exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975"; and

(ii) By striking out "as 216 hours bears to 28 days" in paragraph (2) and inserting in lieu thereof "as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days • • •.

(c) These statutory provisions, as is apparent from their terms, are limited to public agencies and do not apply to any private organization engaged in furnishing fire protection or law enforcement services, and this is so even if the services are provided under contract with a public agency.

(d) In determining whether a public agency qualifies for the section 13(b)(20) exemption after January 1, 1975, the fire protection and law enforcement activities are considered separately. Thus, for example, if a public agency employs less than five employees in fire protection activities but five or more employees in law enforcement activities (including security personnel in a correctional institution), it may claim the exemption for the fire protection employees but not for the law enforcement employees. No distinction is made between full-time and part-time employees, and both must be counted in determining whether the exemption applies. Bona fide volunteers may be excluded. This determination of the number of employees engaged in each of the two named activities is made on a workweek basis.

(e) In addition to the special exemptions provided in sections 7(k) and 13(b)(20), which are the subject matter of Parts 53, the Act provides other exemptions which, depending upon the facts, may be claimed for certain employees in

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lieu of such special exemptions. For example, section 13(a)(1) provides a complete exemption for any employee employed in a bona fide executive, administrative or professional capacity, as those terms are defined and delimited in 29 CFR Part 541, and that exemption may be claimed for any fire protection or law enforcement employee who meets all of the tests specified in Part 541 relating to duties, responsibilities and salary. Thus, although police captains are clearly employees engaged in law enforcement activities, they may also, depending upon the facts, qualify for the section 13(a)(1) exemption, in which event the employing agency may claim that exemption for such employees in lieu of the section 7(k) or 13(b)(20) exemption. Similarly, certain criminal investigative agents may qualify as administrative employees, in which event the employing agency may elect which of the applicable exemptions it will claim for such employees. In no event, however will the election to take the section 13(a)(1) exemption for an employee who qualifies for it result in excluding that employee from the count that must be made under § 553.1(d) in determining whether the employer may claim for its other employees the section 13(b)(20) exemption.

§ 553.2 Purpose and scope.

The purpose of Part 553 is to define the pertinent statutory terms used in sections 7(k) and 13(b)(20) and to set forth the rules by which the Administrator of the Wage and Hour Division will determine the compensable hours of work, tour of duty and work period in applying the section 7(k) exemption.

Employees Engaged in Fire Protection and Law Enforcement Activities (Including Security Personnel in Correctional Institutions)

§ 553.3 Fire protection activities.

(a) As used in section 7(k) and 13(b)(20) of the Act, the term "any employee in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district and who, pursuant to the extent required by State statute or local ordinance, has been trained and has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type and (2) who performs activities which are required for, and directly concerned with the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. The term would include all such employees, regardless of their status as "trainee," "probationary," or "permanent" employee, or of their particular speciality or job title (e.g., firefighter, engineer, hose or ladder operator, fire specialist, fire inspector, lieutenant, captain, inspector, fire marshal, battalion chief, deputy chief, or chief), and regardless of their assignment to support activities of the type described in paragraph (d) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See § 553.7.

(b) The term "any employee in fire protection activities" also refers to employees who work for forest conservation agencies or other public agencies charged with forest fire fighting responsibilities, and who direct or engage in (1) fire spotting or lookout activities, or (2) fighting fires on the fireline or from aircraft or (3) operating tank trucks, bulldozers and tractors for the purpose of clearing fire

breaks. The term includes all persons so engaged, regardless of their status as full time or part time agency employees or as temporary or casual workers employed for a particular fire or for periods of high fire danger, including those who have had no prior training. It does not include such agency employees as biologists and office personnel who do not fight fires on a regular basis, except, of course, during those emergency situations when they are called upon to spend substantially all (i.e., 80 percent or more) of their time during the applicable work period in one or more of the activities described in paragraph (b) (1), (2) and (3) of this section. Additionally, for those persons who actually engage in these fire protection activities, the simultaneous performance of such related functions as housekeeping, equipment maintenance, tower repairs and/or the construction of fire roads, would also be within the section 7(k) or 13(b)(20) exemption.

(c) Not included in the term "employee in fire protection activities" are the so-called "civilian" employees of a fire department, fire district, or forestry service who engage in such support activities as those performed by dispatchers, alarm operators, apparatus and equipment repair and maintenance workers, camp cooks, clerks, stenographers, etc.

§ 553.4 Law enforcement activities.

(a) As used in sections 7(k) and 13(b)(20) of the Act, the term "any employee in law enforcement activities" refers to any employee (1) who is a uniformed or plainclothed member of a body of officers and subordinates who are empowered by statute or local ordinance to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes,

(2) who has the power of arrest, and (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics.

Employees who meet these tests are considered to be engaged in law enforcement activities regardless of their rank, or of their status as "trainee," "probationary" or "permanent" employee, and regardless of their assignment to duties incidental to the performance of their law enforcement activities such as equipment maintenance, and lecturing, or to support activities of the type described in paragraph (f) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's law enforcement activities. See § 553.8.

(b) Typically, employees engaged in law enforcement activities include city police; district or local police; sheriffs, under sheriffs or deputy sheriffs who are regularly employed and paid as such; court marshals or deputy marshals; constables and deputy constables who are regularly employed and paid as such; border control agents; state troopers and highway patrol officers. Other agency employees not specifically mentioned may, depending upon the particular facts and pertinent statutory provisions in that jurisdiction, meet the three tests described above. If so, they will also qualify as law enforcement officers. Such employees might include, for example, fish and game wardens or criminal investiga-

tive agents assigned to the office of a district attorney, an attorney general, a solicitor general or any other law enforcement agency concerned with keeping public peace and order and protecting life and property.

(c) Some of the law enforcement officers listed above, including but not limited to certain sheriffs, will not be covered by the Act if they are elected officials and if they are not subject to the civil service laws of their particular State or local jurisdition. Section 3(e)(2)(C) of the Act excludes from its definition of "employee" elected officials and their personal staff under the conditions therein prescribed. 29 U.S.C. 203(e)(2)(C). Such individuals, therefore, need not be counted in determining whether the public agency in question has less than five employees engaged in law enforcement activities for purposes of claiming the section 13(b)(20) exemption.

(d) Employees who do not meet each of the three tests described above are not engaged in "law enforcement activities," as that term is used in sections 7(k) and 13(b)(20). Such employees would typically include (1) building inspectors (other than those defined in § 553.3(a)), (2) health inspectors, (3) animal control personnel, (4) sanitarians, (5) civilian traffic employes who direct vehicular and pedestrian traffic at specified intersections or other control points, (6) civilian parking checkers who patrol assigned areas for the purpose of discovering parking violations and issuing appropriate warnings or appearance notices, (7) wage and hour compliance officers, (8) equal employment opportunity compliance officers, (9) tax compliance officers, (10) coal mining inspectors, and (11) building guards whose primary duty is to protect the lives and property of persons within the limited area of the building.

(e) The term "any employee in law enforcement activities" also includes, by express reference, "security personnel in correctional institutions." A correctional institution is any government facility maintained as part of a penal system for the incarceration or detention of persons suspected or convicted of having breached the peace or committed some other crime. Typically, such facilities include penitentiaries, prisons, prison farms, county, city and village jails, precinct house lockups and reformatories. Employees of correctional institutions who qualify as security personnel for purposes of the section 7(k) exemption are those who have responsibility for controlling and maintaining custody of inmates and of safeguarding them from other inmates or for supervising such functions, regardless of whether their duties are performed inside the correctional institution or outside the institution (as in the case of road gangs). These employees are considered to be engaged in law enforcement activities regardless of their rank (e.g., warden, assistant warden or guard) or of their status as "trainee," "probationary," or "permanent" employee, and regardless of their assignment to duties incidental to the performance of their law enforcement activities, or to support activities of the type described in paragraph (f) of this section, whether or not such assignment is for training or familiarization purposes or for reasons of illness, injury or infirmity.

(f) Not included in the term "employee in law enforcement activities" are the so-called "civilian" employees of law enforcement agencies or correctional institutions who engage in such support activities as those performed by dispatcher, radio operators, apparatus and equipment maintenance and repair workers, janitors, clerks and stenogra-

phers. Nor does the term include employees in correctional institutions who engage in building repair and maintenance, culinary services, teaching, or in psychological, medical and paramedical services. This is so even though such employees may, when assigned to correctional institutions, come into regular contact with the inmates in the performance of their duties.

§ 553.5 20-percent limitation on nonexempt work.

Employees engaged in fire protection or law enforcement activities, as described in §§ 553.3 and 553.4, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their firefighting activities. For example, those who work for forest conservation agencies may, during slack periods, plant trees and perform other conservation activities. The performance of such nonexempt work will not defeat either the section 7(k) or 13(b)(20) exemption unless it exceeds 20 percent of the total hours worked by the particular employee during the applicable work period.

§ 553.6 Public agency employees engaged in both fire protection and law enforcement activities.

Some public agencies have employees (sometimes referred to as public safety officers) who engage in both law enforcement activities and fire protection activities, depending upon the agency needs at the time. This dual assignment would not defeat either the section 7(k) or 13(b)(20) exemption, provided that each of the activities performed meets the appropriate tests set forth in §§ 553.3 (a), 553.4(a) and (e). This is so regardless of how the employees divide their time between the two types of activities. If, however, either the fire protection or law enforcement activities do not meet the tests of § 553.3(a) or §§ 553.4(a) and (e), and if such nonqualifying activities, standing alone or in conjunction with

some other nonexempt activity, exceed 20 percent of the employee's total hours of work in the work period, neither exemption would apply.

§ 553.7 Employees attending training facilities.

The attendance at a bona fide fire or police academy or other training facility, when required by the employing public agency, does not constitute engagement in exempt activities, unless the employee in question meets all the tests described in § 553.3(a) or § 553.4(a), as the case may be, in which event such training or further training would be incidental to, and thus part of, the employee's fire protection or law enforcement activities. Only the time spent in actual training or retraining constitutes compensable hours of work. All other time, such as that spent in studying and other personal pursuits, is not compensable hours of work even in situations where the employee is confined to campus or to barracks 24 hours a day. See § 553.14. Attendance at training facilities and schools, which is not required but which may incidentally improve the employee's performance of his or her regular tasks or prepare the employee for further advancement, need not be counted as working time even though the public agency may pay for all or part of such training.

§ 553.8 Ambulance and rescue service employees.

(a) Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by sections 7(k) and 13(b)(20) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received

special training in the rescue of fire and accident victims or firefighters injured in the performance of their firefighting duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, riots, natural disasters and accidents.

(b) Ambulance and rescue service employees of public agencies subject to the Act prior to the 1974 Amendments do not come within the section 7(k) or section 13(b)(20) exemptions, since it was not the purpose of those Amendments to deny the Act's protection of previously covered employees. This would include employees of public agencies engaged in the operation of a hospital; an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institutions; a school for mentally or physically handicapped or gifted children; an elementary or secondary school; an institution of higher education; a street, suburban, or interurban electric railway; or local trolley or motor bus carrier.

(c) Ambulance and rescue service employees of private organizations do not come within the section 7(k) or section 13(b)(20) exemptions even if their activities are substantially related to the fire protection and law enforcement activities performed by a public agency.

§ 553.9 Fire protection or law enforcement employees who perform unrelated work for their own agency or for another public agency or private employer.

(a) If an employee regularly engaged in exempt fire protection or law enforcement activities also works for another department or agency of the same State or political subdivision, such employee will lose the exemption if the other work is unrelated to fire protection or law enforcement activities. For example, if a city police officer also works

as a clerk in the city health department, which is clearly nonexempt work, the city could not claim the section 7(k) exemption for such employee and would have to pay overtime compensation for all hours worked for the two agencies in excess of 40 per week. See 29 CFR 778.117 for an explanation of how overtime compensation is computed in such a situation. If, however, such employee's other job for the city is also exempt work, as, for example lifeguarding at a seasonally operated city beach which work is exempt from both the Act's minimum wage and overtime provisions by virtue of section 13(a)(3), the city would be entitled to claim the lesser of the two exemptions which, in the example given would be the section 7(k) exemption, and it would have to pay overtime compensation only for the combined hours (if any) which are in excess of the employee's tour of duty.

(b) These same principles also apply where the fire protection or law enforcement employee works for another public or private employer who, although entirely separate from the employee's regular employer, is nonetheless a joint employer with the fire protection or law enforcement agency. Usually, of course, working for a separate employer does not affect the employee's status as an employee engaged in fire protection or law enforcement activities or the employing agency's right to claim the section 7(k) or 13(b)(20) exemption. In some limited circumstances, however, the relationship between the fire protection or law enforcement agency and the other employer is so closely related that they must be treated as joint employers. Such a joint employment relationship exists where the work done by the employee simultaneously benefits both employers and where it is done pursuant to an arrangement between the employers to

share or interchange employees, or where one employer acts directly or indirectly in the interest of the other employer in relation to the same employee, or where the employers are so closely associated that they share control of the employee, directly or indirectly. See 29 CFR Part 791.

(c) To illustrate, if a police officer independently finds after-hours employment as a repair mechanic in a gas station or as a security guard in a department store, there would be no joint employment relationship between the police department and the second employer. This would be so even if the police officer wore his or her uniform at the second job and even if the police department engaged in such "brokering" functions as maintaining a list of officers available for extra outside work and referring employment requests to such officers. Nor would it matter whether the police department also established a wage scale for such extra outside work and approved it so as to avoid any conflict of interest problem. On the other hand, if the second employer is required by local ordinance or otherwise to hire a police officer to control crowds at a stadium or to direct traffic at a sports arena or during a parade, such employment benefits both the police department and the second employer, and, since both act in the interest of the other, a joint employment relationship is created.

§ 553.10 Mutual aid.

If employees engaged in fire protection activities voluntarily respond to a call for aid from a neighboring jurisdiction, they are volunteers in rendering such aid and their employer is not required to compensate them for the time spent in the neighboring jurisdiction. See § 553.10. If, however, the employees respond to such a call because their employer has a mutual aid agreement with a neighboring jurisdiction or if the employees are directed by their agency to respond, all hours worked by these employees in rendering such aid must be added to their regular hours of work for purposes of the section 7(k) exemption.

§ 553.11 Fire protection and law enforcement volunteers.

(a) Individuals who volunteer to perform fire protection or law enforcement activities, usually on a part-time basis and as a public service, are not considered to be employees of the public agency which receives their services. Such individuals do not lose their volunteer status because their tuition may have been paid or they may have been reimbursed for attending special classes or other training to learn about fire protection or law enforcement or because they are reimbursed for approximate out-of-pocket expenses incurred incidental to answering a call or to the cost of replacing clothing or other items of equipment which may have been consumed or damaged in responding to a call. Nor is the volunteer status of such individuals lost where the only material recognition afforded them is the holding of an annual party, the furnishing of a uniform and related equipment, or their inclusion in a retirement or relief fund, a workman's compensation plan or a life or health insurance program, or the payment of a nominal sum on a per call or other basis which may either be retained, in whole or in part, by the volunteer or donated to finance various social activities conducted by or under the auspices of the agency. Payments which average $2.50 per call will be considered nominal. Payments in excess of this amount may also qualify as nominal, depending upon the distances which must be traveled and other expenses incurred by the volunteer. For purposes of this paragraph, it is not necessary for the

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agency to maintain an exact record of expenses.

(b) Where, however, individuals engaged in fire protection or law enforcement activities receive more than a nominal amount or payment on a basis which does not reasonably approximate the expenses incurred by them, they are employees rather than volunteers and must be paid in accordance with the Act's requirements.

(c) Volunteers engaged in fire protection or law enforcement activities may include individuals who are employed in some other capacity by the same public agency. For example, a civilian PBX operator of a public agency engaged in law enforcement activities may also be a volunteer member of the local police reserve force. Similarly, an employee of a village Department of Parks and Recreation may serve as a volunteer firefighter in his or her local community.

(d) Police officers or firefighters of one jurisdiction may engage in fire protection or law enforcement activities on a voluntary basis for another jurisdiction where there is no mutual aid agreement or other relationship between the two jurisdictions. Such employees cannot, however, perform fire protection or law enforcement activities on a voluntary basis for their own agency, although they can engage in other activities not directly related to these primary functions. For example, a paramedic employed by a city fire department could volunteer to give a course in first aid at the city hospital and a police officer could volunteer to counsel young juveniles who are members of a boy's club or other similar organizations.

Rules for Determining the Tour of Duty, Work Period and Compensable Hours of Work

§ 553.12 General statement.

(a) In extending the Act's coverage to public agency employees engaged in fire protection and law enforcement activities, Congress, recognizing the uniqueness of these activities, established section 7(k) which permits the computation of hours worked on the basis of a work period (which can be longer than a workweek) and which bases the overtime requirements on a work period concept. In adding this provision, Congress made it clear that some adjustment would have to be made in the usual rules for determining compensable hours of work (Conf. Rept. 93-953, p. 27) and where the employer elects section 7(k), these rules must be used for purpose of both the Act's minimum wage and overtime requirements.

(b) If, however, any public agency chooses not to claim the partial overtime exemption provided in section 7(k), but elects to pay overtime compensation as required by section 7(a), it need not concern itself with the "tour of duty" or "work period" discussion which follows or with the special rules relating to the determination of what constitutes compensable hours of work since, in that event, overtime would be payable on a workweek basis and the regular method of computing "hours worked" as set forth in 29 CFR Part 785 would apply. Such an agency would not, however, be able to take advantage of the special provisions of Part 553 relating to the balancing of hours over an entire work period, trading time and early relief.

§ 553.13 Tour of duty.

The term "tour of duty," as used in section 7(k), means the period during which an employee is on duty. It may be a scheduled or unscheduled period. Scheduled periods refer to shifts, i.e., the period of time which elapses between scheduled arrival and departure times, or to scheduled periods outside the shift,

as in the case of a special detail involving crowd control during a parade or other such event. Unscheduled periods refer to time spent in court by police officers, time spent handling emergency situations, or time spent after a shift in order to complete required work. When an employee actually works fewer hours than those scheduled, the employee's tour of duty is reduced accordingly. Nothing in section 7(k) precludes employers (acting pursuant to collective bargaining agreements or in accordance with their own authority) from establishing new tours of duty for their employees, provided, however, that the change is intended to be permanent at the time that it is made.

§ 553.14 General rules for determining compensable hours of work.

(a) Compensable hours of work generally include all of that time during which an employee is on duty or on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer. Such hours thus include all pre-shift and post-shift activities which are an integral part of the employee's principal activity or which are closely related and indispensable to its performance, such as attending roll call, writing up and completing reports or tickets, and washing and re-racking fire hose. It also includes time which an employee spends in attending required training classes. See § 553.7. Time spent away from the employer's premises under conditions so circumscribed that they restrict the employee from effectively using the time for personal pursuits, also constitutes compensable hours of work. For example, a police officer who is required to remain at home until summoned to testify in a pending court case and who must be in a constant state of instant readiness, is engaged in

compensable hours of work. On the other hand, employees who are confined to barracks while attending police academies are not on duty during those times when they are not in class or at a training session since they are free to use such time for personal pursuits. This would also be true in a forest fire situation where employees, who have been relieved from duty and transported away from the fire line, are, for all practical purposes, required to remain at the fire camp because their homes are too far distant for commuting purposes. Also, a police officer who has completed his or her tour of duty but who is given a patrol car to drive home and use on private business, is not working simply because the radio must be left on so that the officer can respond to emergency calls. Of course, the time spent in responding to such calls would be compensable, except in those instances where it is miniscule and cannot, as an administrative matter, be recorded for payroll purposes.

(b) Additional examples of compensable and noncompensable hours of work are set forth in 29 CFR Part 785 which is fully applicable to employees for whom the section 7(k) exemption is claimed except to the extent that it has been modified below in § 553.15.

§ 553.15 Sleeping and meal time as compensable hours of work.

(a) Where the employer has elected to use the section 7(k) exemption, sleep and meal time cannot be excluded from compensable hours of work where (1) the employee is on duty for less than 24 hours, which is the general rule applicable to all employees (29 CFR 785.21) and (2) where the employee is on duty for exactly 24 hours, which represents a departure from 29 CFR 785.21.

(b) Sleep and meal time may, however, be excluded in the case of fire pro-

tection or law enforcement employees who are on duty for more than 24 hours, but only if there is an express or implied agreement between the employer and the employee to exclude such time. In the absence of any such agreement, sleep and meal time will constitute hours of work. If, on the other hand, the agreement provides for the exclusion of sleep time the amount of such time shall, in no event, exceed 8 hours, in a 24-hour period, which is also the amount of time permitted when the agreement fails to specify the duration of sleep time. If such sleep time is interrupted by a call to duty, the interruption must be counted as hours worked, and if the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep (which, for enforcement purposes, means at least 5 hours), the entire time must be counted as hours of work.

§ 553.16 Work period.

(a) As used in section 7(k), the term "work period" refers to any established and regularly recurring period of work which, under the terms of the Act and legislative history, cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation, the work period can be of any length, and it need not coincide with the pay period or with a particular day of the week or hour of the day. Once the beginning time of an employee's work period is established, however, it remains fixed regardless of how many hours are worked within that period. The beginning of the work period, may, of course, be changed, provided that the change is intended to be permanent at the time that it is made.

(b) An employer may have one work period applicable to all of its employees, or different work periods for different employees or groups of employees. Prior

approval from the Wage and Hour Division is not required. The employer must, however, make some notation in its records which shows the work period for each employee and which indicates the length of that period and its starting time.

(c) For those employees who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required until the ratio between the number of days in the work period and the hours worked during such work period exceeds the ratio between a work period of 28 days and 240 hours, at which point all additional hours are paid for at one and one-half times the employee's regular rate of pay.

(d) The ratio of 240 hours to 28 days is 8.57143 hours per day (8.57 rounded). Accordingly, overtime compensation at a rate of not less than one and one-half times the employee's regular rate of pay must be paid during calendar year 1975 for all hours worked in excess of the following maximum hours standards:

Work period (days):	*Maximum hours standard*
28	240
27	231
26	223
25	214
24	206
23	197
22	189
21	180
20	171
19	163
18	154
17	146
16	137
15	129
14	120
13	111
12	103
11	94
10	86
9	77
8	69
7	60

§ 553.17 Early relief.

It is a common practice among employees engaged in fire protection activities to relieve employees on the previous shift or tour of duty prior to the scheduled starting time. Such early relief may occur pursuant to employee agreement, either expressed or implied. This practice will not have the effect of increasing the number of compensable hours of work where it is voluntary on the part of the employees and does not result, over a period of time, in their failure to receive proper compensation for all hours actually worked. On the other hand, if the practice is required by the employer the time involved must be added to the employee's tour of duty and treated as compensable time.

§ 553.18 Trading time.

Another common practice or agreement among employees engaged in fire protection or law enforcement activities is that of substituting for one another on regularly scheduled tours of duty (or for some part thereof) in order to permit an employee to absent himself or herself from work to attend to purely personal pursuits. This practice is commonly referred to as "trading time." Although the usual rules for determining hours of work would require that the additional hours worked by the substituting employee be counted in computing his or her total hours of work, the legislative history makes it clear that Congress intended the continued use of "trading time" "both within the tour of duty cycle • • • and from one cycle to another within the calendar or fiscal year without the employer being subject to [additional overtime compensation] by virtue of the voluntary trading of time by employees" (Congressional Record, March 28, 1974, Page S 4692). Accordingly, the practice of "trading time" will be deemed to have no effect on hours of work if the following criteria are met: (a) The trading of time is done voluntarily by the employees participating in the program and not at the behest of the employer; (b) the reason for trading time is due, not to the employer's business operations, but to the employee's desire or need to attend to personal matter; (c) a record is maintained by the employer of all time traded by his employees; (d) the period during which time is traded and paid back does not exceed 12 months.

§ 553.19 Time off for excess hours or so-called "comp time."

(a) As a general rule, all overtime hours must be paid for in cash and not in time off. Section 7(k) creates a partial exception to this general rule by allowing employers to balance the employee's hours over a work period, which, as indicated in § 553.16, may be longer than a workweek, and to pay the overtime compensation required by the Act only if the employee's hours exceed the total number of hours established by section 7(k) for that particular work period. Thus, for example, if the duration of the employee's work period is 28 consecutive days, and he or she works 80 hours in the first week, but only 60 in the second week and 50 in each of the next 2 weeks, no additional overtime compensation would be required, since the total number of hours worked does not exceed 240. Of course, there might be a State law requiring overtime compensation at some earlier point (e.g., for any hours worked in excess of 40 in a week), but that obligation could be met with "comp time," if comp time is permissible under State law and if the wages paid to the employee for all hours worked during the entire 28-day tour of duty equal at least the minimum wage set forth in section

6(b) of the Act (29 U.S.C. 206(b)). Similarly, an employee whose work period is 1 week could be paid in "comp time" for all excess hours up to 60, provided that comp time is a permissible form of payment under State law and provided, also, that the wages paid to the employee equal at least the statutory minimum wage. Such "comp time" could be taken at any time authorized by state law or local ordinance.

(b) If the employee in either of the examples given above works more than the stated number of hours for a 7-day or 28-day work period, overtime compensation must be paid at one and one-half times the employee's regular rate. In computing the employee's regular rate, the cash equivalent of any comp time must be included. See also § 553.20.

§ 553.20 The "regular rate".

The rules for computing an employee's "regular rate," for purposes of the Act's overtime requirements, are set forth in 29 CFR Part 778. These rules are fully applicable to employees for whom the section 7(k) exemption is claimed, except that wherever the word "workweek" is used the word "work period" should be substituted.

§ 553.21 Records to be kept.

The recordkeeping requirements of the Act are set forth in 29 CFR Part 516. These requirements are applicable to public agencies engaged in fire protection and law enforcement activities, except that where section 7(k) is claimed, the records for those employees can be kept on a work period, instead of a workweek, basis. In addition, the records must show, as indicated in § 553.16(b), the work period for each employee.

Signed at Washington, D.C. this 18th day of December 1974.

BETTY SOUTHARD MURPHY,
Administrator.

[FR Doc.74-29843 Filed 12-19-74;8:45 am]

Affidavit of Jack I. Karlin, Dec. 27, 1974
(in Support of Defendant's Motion to Dismiss)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NATIONAL LEAGUE OF CITIES, et al.,	)	
Plaintiffs	)	
v.	)	Civil Action
	)	No. 74-1812
THE HONORABLE PETER J. BRENNAN, Secretary of Labor,	)	
Defendant	)	

AFFIDAVIT

District of Columbia) SS:

Jack I. Karlin, being duly sworn, deposes and says:

1. I am Director, Division of Evaluation and Research, Office of Program Development and Accountability, Employment Standards Administration, U.S. Department of Labor.

2. As such I am responsible for all the long term research conducted by and for the Employment Standards Administration (ESA) including the development of all official coverage and impact estimates for the laws administered by ESA.

3. I have been employed by the Department of Labor since April 1940, preparing coverage estimates, estimates of impact and economic effects studies. For the past four

years I have been the Director of Evaluation and Research.

4. In connection with the issuance of 29 C.F.R. Part 553, I was asked to estimate the cost of the impact of the overtime provisions on State and local government public safety employees (policemen, firemen and security personnel in correctional institutions). The $27 million dollar estimate included in Part 553 as published in the Federal Register on December 20, 1974, 39 F.R. 44142, is based upon the following:

5. The March 1970 survey[1] of hours for State Government employees shows that 3.1 percent of public safety employees worked more than 48 hours in the survey week.[2] The survey of hours for local government employees shows that 11.0 percent of public safety employees worked more than 48 hours in the survey week.[3] Using recognized statistical methods, my staff extrapolated from the survey estimates of the percentage of such employees working over sixty hours and the average number of hours over 60 worked by them.

6. These estimates are:

(a) 0.4 percent of the State public safety employees worked over 60 hours per week, and averaged 6.9 hours per week over 60.

(b) 3.8 percent of the local government public safety employees worked over 60 hours per week, and averaged 11.6 hours per week over 60.

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[1] U.S. Department of Labor, Workplace Standards Administration, *Nonsupervisory Employees in State and Local Governments: Data Pertinent to an Evaluation of the Feasibility of Extending Minimum Wage and Overtime Protection under the Fair Labor Standards Act*, Washington, 1971. Defendant's deposition, Exhibit 37.

[2] Table 24, page A-28.

[3] Table 25, page A-29.

7. (a) These estimates are applied to the most recent (*i.e.*, as of October 1973) estimates of public safety employees who are covered by the 1974 Amendments and qualify for the 7(k) exemption. Thus, the 0.4 estimate is applied to 110,000, the total of State government employees. This yields a total of approximately 400 employees who worked more than 60 hours.

(b) The 3.8 estimate is applied to 477,000, the total of local government employees. This yields a total of approximately 18,000 employees who worked more than 60 hours.

8. (a) Multiplying 6.9 hours times 400 employees times 52 weeks equals approximately 144,000 hours over 60 per week worked by State public safety employees.

(b) Multiplying 11.6 hours times 18,000 employees times 52 weeks in the year equals approximately 10,860,000 hours over 60 per week worked by local government public safety employees.

9. The average hourly earnings was estimated to be approximately $5.00. This estimate was based on the March 1970 survey ($3.71) and updated to October 1974 according to the percentage change indicated in the monthly earnings reported in *Public Employment*, an annual Bureau of the Census publication, for police protection and local fire protection.

10. (a) Thus, the increased cost for overtime work (*i.e.*, the additional half-time premium) totals approximately $360,000 for State governments (144,000 hours times $2.50 per hour).

(b) The increased cost for local governments is $27,150,000 (10,860,000 hours times $2.50 per hour).

(c) The total of the above costs for State and local

governments as shown in this affidavit is $27,510,000.[4]

11. The cost was also estimated using the same technique on the combined State and local figures. This yielded a lower cost estimate. For the purpose of Part 553, the higher estimate was used.

/s/ Jack I. Karlin
Jack I. Karlin

Sworn and subscribed this 27th day of December, 1974.

/s/ Betty-Jo Boudine
Notary Public
My Commission Expires
November 30, 1978

[4] For the sake of simplification, more rounded figures were used in this affidavit. Using less rounded figures, the total was slightly lower.

Letter, William F. Danielson to Charles S. Rhyne, Dec. 24, 1974

CITY OF SACRAMENTO
DEPARTMENT OF PERSONNEL
201 NINTH STREET, ROOM 201
SACRAMENTO, CALIF. 70414

December 24, 1974

Mr. Charles S. Rhyne
Rhyne and Rhyne
400 Hill Building
839 – 17th Street, N.W.
Washington, D.C. 20006

BEST COPY AVAILABLE

Dear Mr. Rhyne:

Your office has requested that I provide a written explanation of my estimate of $200,000,000 additional costs to state and local governments during the calendar year 1975 for fire protection services and further additional costs in 1976, 1977 and 1978 as a result of the imposition of the Fair Labor Standards Act.

Estimated 220,000 Firefighters in United States

Mr. Gerald M. Feder. representing the International Association of Fire Fighters, in his testimony before the Department of Labor on November 21, 1974, stated that there are 220,000 full-time firefighters in the United States at this time. I have no reason to doubt that Mr. Feder's estimate of the number of firefighters in the United States is not correct. Recent survey data from the International City Management Association and from several official governmental sources confirm this estimate, either directly or indirectly.

Estimate of 205,700 Fire Suppression Employees

Not all uniformed firefighters are assigned to fire suppression. In the report which I prepared for the League of California Cities entitled, "Fire Department Working Conditions and Salaries", in January 1965, most California municipal fire departments were surveyed in detail. In 1964 in California cities surveyed there were 14,256 firefighters, of whom 923 were assigned to a 40-hour work week, performing administration, fire prevention, or other such duties, and 13,333 were assigned to fire suppression. Therefore, 6.47% of California firefighters were assigned to a 40-hour work week; 93.53% of California firefighters were assigned to fire suppression duties. The ratio of about 6.5% of firefighters being assigned to other than fire suppression activities is still a good one to use. If anything, with the reductions in duty hours which have taken place in the last ten years, requiring greater staffing in fire suppression than in fire prevention, it is possible that the percentage of firefighters assigned to fire suppression may be as high as 94 or 95%. However, I have chosen to be conservative in this calculation in every respect. Therefore, my estimate is that 93.5% of the 220,000 firefighters in the United States are assigned to fire suppression duties, or 205,700 firefighters.

Average Fire Salary is $11,123 Per Year

The federal Equal Employment Opportunity Commission recently released a compilation of the survey information contained within the EEO-4 forms submitted by 5,007 state and local governments throughout the United States. This information was gathered as of October 1973. The EEOC survey divides state and local

governments into fifteen occupational categories, one of which is fire protection. The median salary of fire protection employees is shown to be $11,123 per year, which, as I recall, is the highest median salary for any occupational group in state and local governments. The 1973 median salary of $11,123 times the estimated 205,700 fire employees assigned to fire suppression equals an annual salary expenditure for fire suppression activities of about $2,288,001,100. Adjusting this figure by a conservative 6% to add salary adjustments received since October 1973 increases the estimate of 1974 fire suppression salaries to $2,425,280,000.

International City Management Association
Fire Scheduling Survey

In May and June 1974, I wrote the questions which were used in the special survey of fire duty hour scheduling practices in United States cities over 10,000 population conducted by the International City Management Association. I reviewed the tabulation of the results of that survey and included this information as a part of the statement on behalf of the National League of Cities and other public interest groups which was submitted to the Department of Labor on July 5, 1974. Subsequently, this data has been refined and published by the Urban Data Service of the International City Management Association in October 1974 in the publication I co-authored entitled, "Fire Duty Schedules and the Fair Labor Standards Act". Table 5a of the Urban Data Service report shows a total of 1,263 cities reporting information as to the average number of firefighters' hours on duty per week, averaged over a year. Table 5b shows that, of the 1,263 cities, 1,068

report having an average fire duty week of 60 hours or less. Therefore, 195 cities, or 15.43% of the total number of cities reporting, indicate having an average duty week above 60 hours. The size of the fire departments which reported average hours on duty per week above 60 is somewhat smaller than the cities reporting an average of 60 hours a week or less. It is estimated that the 15.43% of cities represent at least 10% of the total fire suppression payroll. Therefore, 10% of the fire suppression payroll is $228,800,000. Using unpublished data of the array of duty weeks reported by cities above an average of 60 per week, the mean average duty week for the group of 195 cities is 68.0. For the particular group of cities whose average fire duty week is above 60, it will be necessary to reduce the hours on duty to 60 or less commencing January 1, 1975, to avoid the penalties imposed by the Fair Labor Standards Act. The reduction from an average of 68 to 60 is a reduction of 8 hours, equivalent to an average increase of 13.33% in fire suppression payroll costs. *Therefore, the 13.33% increase in the fire suppression payroll costs in cities with average fire duty schedules of over 60 per week is estimated to be a minimum of $30,499,000 ($228,800,000 x 13.33%).*

Additional Costs Caused by Fire
Duty Cycle vs. Work Period

The ICMA survey shows that less than half of the fire departments in the United States presently have fire duty cycles which fit immediately between 7 and 28 days. Forty-one percent (41%) of the cities have fire duty cycles ranging from 2 to 6 days. Nine and one-half percent (9.5%) have reported fire duty cycles in excess of 28 days.

The 41% of the cities which have fire duty cycles of less than 7 days will be able to declare a work period of between 7 and 28 days. However, it is difficult to estimate the additional costs to this particular group of cities. Some of the problems involved in estimating these costs are that there are three time cycles which interact for employees engaged in fire protection activities pursuant to the Fair Labor Standards Act:

1. The length of the *work period* to be declared;
2. The length of the *pay period* used by the governmental agency;
3. The length of the *fire duty cycle*.

Previously the Department of Labor has had to contend with only two time cycles: (1) the *work week* (*work period*) of 7 days (and for certain instititional and hospital employees which may be 14 days) and (2) the *pay period* of the employer. The problems of dealing with the third time cycle grow at least exponentially with the introduction of the *fire duty cycle* and will create hidden liability which many cities will not recognize until too late.

Almost all of the 205,700 fire suppression personnel have been paid on a salaried basis until now. For almost all firefighters, salaries have been expressed in terms of monthly or annual amounts. Relatively few firefighters have been paid by the hour. The basic concept of the Fair Labor Standards Act requires that persons covered under the Act be paid by the hour. It is the general practice of almost all private employers to pay employees covered by the Fair Labor Standards Act by the hour. The Fair Labor Standards Act will force state and local governments to convert, similarly, all covered employees to be paid by the hour in order to fully comply with all

of the provisions of the Code of Federal Regulations. (This is not mandated by the law, but is a practical necessity.) Until firefighter pay is converted to a unit of pay per hour, governmental agencies will be especially vulnerable to liabilities incurred while firefighters continue to be paid on the pre-FLSA salaried basis.

In the first year, the impact of the new law and its many regulations unquestionably will expose to liability a great many cities and other state and local public jurisdictions which have not had the time to understand fully the implications of the new law and its accompanying regulations. I have only received the final regulation 29 CFR 553 today, December 24. I have not yet had the opportunity to read and fully understand it. Relatively few of the public agencies in the United States will have had an opportunity prior to the effective date of January 1, 1975, to receive the final regulation and to comprehend its meaning and to take appropriate steps. Unquestionably a great many cities and other public agencies will not have taken the steps necessary to declare a work period and otherwise utilize the partial exemption under the 7(k) provision of the Act. Failure to utilize the 7(k) exemption will render cities liable to pay time and a half over 40 hours within 7 days to firefighters and to law enforcement officers. This liability will be very substantial and is difficult to estimate. However, I will try to do so.

Over half of United States cities (50.5%) report using fire duty cycles which are less than 7 days or greater than 28 days in length. In addition, as is indicated on page 4 of the Urban Data Service report, "it appears from the returns that about 15% to 20% of the fire schedules may use some form of pay back or Kelly Day. If this estimate

is correct, then the number of cities with fire duty cycles greater than 28 days is probably at least double that reported." This means that at least 60% of American municipal fire departments presently have fire suppression duty cycles which are either shorter or longer than the Section 7(k) work period options of 7 up to 28 days.

In fire departments with fire duty cycles longer than 28 days, it almost always will be necessary to revise the duty schedule to avoid paying substantial unnecessary overtime (even though no additional fire hours will be worked). In all fire departments which use "paybacks", it will be necessary to immediately cease this practice and revise the fire duty schedule. In many fire departments which use "Kelly Days", it will be necessary to revise the fire duty schedule in order to avoid unnecessary fire overtime. In departments which have practiced different types of scheduling during the summer than the rest of the year, and have averaged hours over a year, it will be necessary to change scheduling practices.

Many fire departments which have average duty hour schedules of 60 or less have assumed that no further action is necessary on their part because of the new law. It is not realized that although a fire department may have a 48-hour average duty week, that where the fire duty cycle is longer than 28 days, the city may be vulnerable to paying substantial unnecessary fire overtime.

I estimate that many of the 60% of the cities which have fire duty cycles which are less than 7 days in length or greater than 28 days will either fail to declare a work period for employees engaged in fire protection activities, or will fail to revise the fire duty cycle to protect the city

(or be precluded from doing so by state law), or will fail to declare a work period for fire employees which will adequately protect the city from payment of unnecessary fire overtime.

We are considering the extra additional costs to the cities for "employees engaged in fire protection" pursuant to the Fair Labor Standards Act regulations. The payroll of these cities (exclusive of the 10% for fire departments averaging over 60 hours per week) is estimated to be (60% of 90% of total payroll) 60% x $2,182,752,000 = $1,309,651,200.

Section 7(k) of the Act requires that two conditions be met in order for a public agency to qualify for the partial exemption: (1) a work period must be declared of between 7 and not to exceed 28 days; (2) during 1975, overtime at one and one-half must be paid for hours worked within the work period over a ratio of 60 hours to seven days. If a public agency does not meet both of these conditions, the 7(k) exemption does not apply, and Section 7(a) of the Act does apply. That is, the city is required to pay one and one-half in the work period for hours worked over 40 in seven days.

The most commonly used fire duty cycle in the nation is the average 56 hours duty week, in which a firefighter is on duty 24 hours and off duty 48 hours in every three-day cycle. In this instance, if a city would fail to declare a work period, the penalty would be that the salary of the fire employees would be considered to be applied to the first forty hours, and the city would be required to pay overtime at time and one-half for 16 hours. At time and one-half for 16 hours, the city would be liable to pay 24 hours extra on top of salary figured on a regular rate based on 40 hours. This is equivalent to

a 60% liability, at the least. If double damages are assessed, the liability could be 120% of payroll for all work periods in which this would occur.

If a city with a 24-hours-on-duty, 48-hours-off-duty (56 hours average) fire duty cycle should mistakenly declare a work period of 7 days, the penalty would be almost as costly as if the city declared *no* work period. On this arrangement, a city would have the following experience:

1st week: X O O X O O X 72 hours (12 hrs. overtime over 60 at 1½ = 18 hrs)

2nd week: O O X O O X O 48 hours (no overtime penalty)

3rd week: O X O O X O O 48 hours (no overtime penalty)

The city would have to pay overtime for 18 hours every third week, even though no overtime was worked. If the city failed to pay overtime in any week when 72 hours were worked, then the city would be liable to pay 32 hours of overtime at time and one-half equal to 48 hours of additional pay every three weeks. The exposure of 48 hours for every 168 hours worked is equivalent to 28.57% liability of total fire suppression payroll.

Liability exposure will vary from one community to another, but in all cases it will be substantial. In many cities, there will be a risk of exposure to overtime claims from firefighters which will be in excess of 100% of firefighter salary, even though no overtime is worked by firefighters.

It is a virtual certainty that where the liability may exist that claims will be filed sooner or later with the Department of Labor to collect.

Many cities will manage to avoid the booby traps which are set within the Fair Labor Standards Act, but some cities will fall victim to them. I have been receiving telephone calls and correspondence from throughout the United States for several months now from fire chiefs, city managers, personnel directors, mayors, and other officials concerned with the law. The state of knowledge of the Act is minimal at this time among officials who will be responsible for administering the Act and its provisions.

I estimate that at least 25% of United States cities will fall victim to the Fair Labor Standards Act and become liable to pay for fire overtime, although no overtime is worked, during 1975. Probably these claims will not surface until the latter part of 1975 and, therefore, these cities will be confronted with substantial claims for fire overtime either during or by the end of 1975. I do not know, and cannot know, the extent to which cities will be assessed double damages for such overtime claims.

Using conservative assumptions, it is likely that 25% of the cities with fire duty cycles less than 7 days or greater than 28 days will, during 1975, incur fire overtime liability for fire suppression ranging from a few days to the entire year. I estimate that potential additional penalties will be about 40% of fire payroll for these cities. Estimated cost, therefore, is $130,900,000 (25% of $1,309,651,200 = $327,250,000 x .40 = $130,900,000).

A similar liability exposure exists for the cities which do have fire duty cycles of between 7 and 28 days. These cities do not have quite the problems in adjusting fire schedules nor the hazards in the same degree as the cities which have fire duty cycles of less than 7 or greater than 28 days. Therefore, the risk factor is less. The annual fire

payroll for these cities is (40% of 90% of total payroll) 40% of $2,182,752,000 = $873,100,800. If only 10% of these cities fail to declare a work period, or declare an erroneous work period, the payroll exposed to liability will be: 10% x $873,100,800 – $87,310,080. Again, if exposed, the penalty will be probably about 40%. Therefore, estimated overtime penalty in 1975 for cities with these fire duty cycles is: 40% x $87,310,080 = $34,924,030.

Summary Estimated 1975 Costs

In summary, estimated 1975 costs to state and local public agencies for fire protection caused by the Fair Labor Standards Act will be:

1. Reduction to 60 hour maximum fire duty schedule . . . . . $ 30,499,000
2. Costs to jurisdictions with fire duty cycles less than 7 or greater than 28 days 130,900,000
3. Costs to jurisdictions with fire duty cycles of between 7 days and 28 days 34,924,000
4. Extra costs related to joint employment provisions of the Act 10,000,000

$206,323,000

There are so many ways for a public agency to trip and incur unanticipated costs that I am sure that the above estimate will be too low for 1975. The estimate means that the overall fire suppression payroll in the United States would be raised by about 9%. However, this increase would not be added equally to each public agency. Some fire departments will incur no additional costs because of Fair Labor Standards Act; some will incur such severe additional costs as to require doubling of payrolls or halving of fire services.

All of the above discussion is related to the calendar year 1975. For calendar years 1976, 1977 and 1978 different cost estimates must be made.

Cost Estimates: 1976, 1977, 1978

By the end of the year 1975, most public jurisdictions will have discovered and corrected most or all of the "work period" problems through hard experience with the new and unfamiliar law. Therefore, no work period costs are estimated for this reason after 1975.

1976

In 1976, overtime will be required to be paid for hours worked in excess of 58 in 7 days within the work period. Using the fixed post manning concept, it is not possible to construct a 58-hour average fire duty schedule within a 7-day to 28-day work period. The nation's fire departments will be required to lower hours to 56 therefore, rather than an impossible 58-hour figure.

This will require reduction from 60 hours to 56 hours for all fire departments at 60 hours in 1975, plus reduction of hours for any other departments now between 56 and 60 (such as the City of Sacramento) during 1975.

To reduce from 60 to 56 hours is equivalent to an additional cost of 7.14%. Applied to the larger base of 20% of payroll, this is equivalent to new costs of $2,288,000,000 x 20% - $457,600,000 (payroll understated because of no factor for salary increase or increase caused by 1975 FLSA compliance). $457,600,000 x 7.14% = $32,672,400 plus carryover cost of $30,499,000 from 1975 = $63,171,400 additional fire costs in 1976.

1977

The law requires overtime to be paid at time and one-half over 54 in 1977. This will require about 80% of fire payroll to be reduced by two hours from 56, equal to 3.7% increase:

$2,288,000,000 x 80% = $1,830,400,000	
x 3.7% =	$ 67,724,900
Plus additional carryover from 1975 and 1976	63,171,400
	$130,896,300

1978

The crushing costs of the Act are likely to fall in 1978, three years hence. If the Secretary of Labor would decree that overtime hours at time and one-half will be required at less than 54, as seems probable, the following costs are possible:

Over 48 hours:

$2,288,000,000 x 90% = $2,059,200,000	
x 12.5% =	$257,400,000
Plus carryover 1975,1976,1977	130,896,000
	$388,296,000

Over 46 hours:

$2,059,200,000 x 17.39% =	$358,094,900
Plus carryover 1975, 1976, 1977	130,896,000
	$488,990,000

Over 44 hours:

$2,059,200,000 x 22.72% =	$467,850,240
Plus carryover 1975, 1976, 1977	130,896,000
	$598,746,000

Summary of Estimated Costs:

1975	$206,323,000
1976	63,171,400
1977	130,896,300
1978 (over 44 est.)	598,746,000
	$999,136,000

As none of the above estimates include any factors for salary increases, or increased size of fire suppression forces, the estimates, in fact, should exceed one billion dollars over the four-year cumulative period to fully experience the 1974 Amendments of the Fair Labor Standards Act for employees engaged in fire protection activities.

I wish to reiterate that I have not had a full opportunity to read carefully the final regulation 29 CFR 553 which was issued in the Federal Register 20 December 1974, which I have just received today. There may be additional cost factors contained in the regulation (such as the reduction in hours in the work period for 27 days being changed to required overtime over 231 hours instead of 232, as appeared in the preliminary regulation) which may have some impact. I believe that the $27 million cost impact estimate contained in the preamble of the final 29 CFR 553 regulation is extremely underestimated, as I have made no estimates in this letter of the additional costs which will be required for the hundreds of thousands of part-paid volunteer firefighters, nor of the costs to law enforcement agencies throughout the United States, as a result of the Fair Labor Standards Act. These costs also are substantial, and would be in addition to the fire suppression estimates presented here.

Very truly yours,

/s/ William F. Danielson
William F. Danielson
Director of Personnel

Supplementary Affidavit of Jack I. Karlin, Dec. 30, 1974

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NATIONAL LEAGUE OF CITIES, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action
	)	No. 74-1812
THE HONORABLE PETER J. BRENNAN, Secretary of Labor,	)	
Defendant.	)	

SUPPLEMENTARY AFFIDAVIT

District of Columbia) SS:

JACK I. KARLIN, being duly sworn, deposes and says:

1. This supplements my affidavit of December 27, 1974, which has been filed in this action.

2. On December 27, 1974, I received a copy of a letter from William F. Danielson to Charles S. Rhyne, dated December 24, 1974, which purports to explain Mr. Danielson's "estimate of $200,000,000 additional costs to state and local governments during the calendar year 1975 for fire protection services and further additional costs in 1976, 1977 and 1978 as a result of the imposition of the Fair Labor Standards Act" (page 1). Mr. Danielson's letter estimates "1975 costs to state and

local public agencies for fire protection caused by the Fair Labor Standards Act will be" $206,323,000 (page 6).

3. The total of $206,323,000 includes $165,824,000 (items 2 and 3 at page 6) which I consider too speculative to be statistically valid. This amount is based upon the assumption that a substantial percentage of the cities whose tours of duty for firefighters do not exceed the maximum hours permitted without premium pay (an average of 60 hours per week) will mistakenly fail to elect the provisions of the Fair Labor Standards Act which will permit them to avoid all overtime premium pay.

In my opinion it is too conjectural to assume that State and local public agencies will mistakenly overspend in the amount of $165,824,000 by failing to utilize the available provisions under the Act that would eliminate such overspending. This is particularly true in view of the fact that as long ago as June 1974 the International City Management Association issued a report (prepared by Mr. Danielson) which explained how public agencies can avoid unnecessary fire overtime, and this report was known to the National League of Cities in June of 1974 (Defendant's Deposition Exhibit 3).

4. The total of $206,323,000 also includes $10,000,000 (item 4 page 6) said to reflect "extra costs related to joint employment provisions of the Act." This $10,000,000 amount is not explained in the letter.

5. This leaves $30,499,000 (item 1 at page 6) which is said to relate to "Reduction to 60-hour maximum fire duty schedule." I am not aware of any articulated, specifically supported estimate filed in this case by plaintiffs that estimates any cost to State and local public agencies under the 60-hour maximum provisions for policemen and correctional employees. When this is considered, the $30,499,000, while larger than the $27,000,000 estimate made by the Department of Labor

as the cost of the overtime provisions pertaining to public safety employees, is of the same general order of magnitude as the Department of Labor's estimate.

6. Moreover, with further reference to the $30,499,000 estimate, I find a number of shortcomings in that amount. Succintly stating some of them in the interest of brevity, they are:

First. The total of 205,700 firefighters on page 1 and the median salary of $11,123 per year on page 2 do not appear adequately to take into account exempt executive, professional and administrative employees.

Second. The use of a median amount rather than a mean amount is not appropriate for the purpose of the letter.

Third. No basis is stated for the letter's estimate that the 15.43% of the cities reporting represent at least 10% of the total fire suppression payroll.

Fourth. The 13.33% figure on page 2, stated as representing the average increase in fire suppression payroll costs, does not seem to me to be supportable. For example: Let us suppose that a city, prior to the Amendments, paid its firefighters a salary of $272 per week regardless of hours worked. The Amendment's provision for premium pay would be satisfied by paying $288 for a 68-hour week. This represents $272 divided by 68, to obtain the hourly rate for that week ($4.00)

and $16.00 premium pay for overtime (8 hours times $2.00).[1] In this example, the percentage increase in cost is approximately 6% rather than 13.33%.

/s/ Jack I. Karlin
JACK I. KARLIN

Sworn to and subscribed before me this 30th day of December, 1974.

/s/ Joyce P. Burch
Notary Public

[Certificate of service omitted]

[1] This method cannot be used if the hourly rate for the week comes out less than the minimum wage.

Opinion and Order of District Court below, dismissing Complaint and denying Preliminary Injunction. Dec. 31, 1974

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1812

THE NATIONAL LEAGUE OF CITIES,
an Illinois Corporation, on
behalf of its member cities,
1620 Eye Street, N.W.,
Washington, D.C. 20006,

THE NATIONAL GOVERNORS' CONFERENCE,
a District of Columbia Corporation,
on behalf of its members,
1150 Seventeenth Street, N.W.,
Washington, D.C. 20036,

The State of ARIZONA
N. Warner Lee, Attorney General
State Capitol
Phoenix, Arizona 85007

METROPOLITAN GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY, Tennessee
Milton H. Sitton, Director of Law
204 Courthouse
Nashville, Tennessee 37201,

The City of SALT LAKE CITY, Utah
Roger F. Cutler, City Attorney
101 City and County Building
Salt Lake City, Utah 84114,

The City of LOMPOC, California
Alan Davidson, City Attorney
119 West Walnut Avenue
Lompoc, California 93436,

The City of CAPE GIRARDEAU, Missouri
Thomas Utterback, City Attorney
Office of the City Attorney
Cape Girardeau, Missouri 63701,

Plaintiffs,

and

The State of CALIFORNIA,
State Capitol,
Sacramento, California 95814

by and through

EVELLE J. YOUNGER,
Attorney General, on
behalf of the People of
the State of California,

RONALD REAGAN
Governor,

VERNE ORR
Director, Department of Finance,

JAMES G. STEARNS
Secretary, Agriculture and Services Agency,

FRANK J. WALTON
Secretary, Business and Transportation Agency,

NORMAN B. LIVERMORE, JR.
Secretary, Resources Agency,

JAMES E. JENKINS
Secretary, Health and Welfare Agency,

Plaintiffs-Intervenors,

and

The State of INDIANA
Theodore L. Sendak, Attorney General
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Indianapolis, Indiana,

The State of IOWA
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The State of UTAH
Vernon B. Romney, Attorney General
State Capitol
Salt Lake City, Utah 84114,

The State of WASHINGTON
Slade Gorton, Attorney General,
Temple of Justice
Olympia, Washington 98504,

Plaintiffs-Intervenors,

v.

The Honorable PETER J. BRENNAN
Secretary of Labor
of the United States,

Defendant.

Per Curiam:

Petitioners, individual cities and states, the National League of Cities, and the National Governors' Conference, challenge the 1974 amendments to the Fair Labor Standards Act (FLSA), Public Law 93-259, 88 Stat. 55, amending 29 U.S.C. §§ 201 *et seq.* (1970), as beyond the power of Congress under the Commerce Clause in that they purport to extend the coverage of the FLSA to nonsupervisory state and municipal employees, including police and firemen. The Amendments generally went into effect on May 1, 1974; provisions relating to overtime pay of police and firemen become effective on January 1, 1975. Plaintiffs seek a declaratory judgment and temporary and permanent injunctive relief. Defendant opposed a temporary injunction, and moved to dismiss the action for failure to state a claim upon

which relief can be granted. A three-judge district court was duly convened. We grant defendant's motion to dismiss the complaint.

Although plaintiffs have raised a difficult and substantial question of law, we feel that our decision is controlled by the decision of the Supreme Court in *Maryland v. Wirtz*, 392 U.S. 183 (1968).[1] Upholding the constitutionality of an earlier extension of the FLSA to cover employees of state-operated schools and hospitals against an attack similar to that lodged here, Justice Harlan, writing for the court, found a sufficient and independent rational relationship of the provisions of the Act to interstate commerce in that state hospitals and schools were significant purchasers of out-of-state goods and that strikes and work stoppages involving their employees would consequently interrupt and burden the flow of goods across state lines. 392 U.S. at 194-95. Since it is uncontested that the state and municipal institutions whose employees are reached for the first time by the 1974 Amendments do make substantial purchases in interstate commerce of equipment and other goods, the decision in *Wirtz* disposes of this case.

Although the theory discribed above was an explicitly independent ground for the decision, there is language in

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[1] In this opinion we have not addressed ourselves to any issue concerning the regulations and rulings issued by defendant under the 1974 amendments, either as to procedure followed, or as to substantive compliance with the Act. These issues were not the core of the complaint filed, and the contentions may be presented by plaintiffs either by way of defense, or in actions for declaratory relief. *See* National Automatic Laundry and Cleaning Council v. Shultz, 143 U.S. App. D.C. 274, 443 F .2d 689 (1971).

the opinion that stresses that the state competes with private institutions which also operate schools and hospitals.[2] The institutions whose employees are in question here perform governmental functions, not seriously in competition with private industry. Moreover, there is evidence that the impact of the 1974 Amendments, in terms of confusing and complex regulations and an enormous fiscal burden on the states, is so extensive that it may seriously affect the structuring of state and municipal governmental activities by reducing flexibility to adapt to local and special circumstances, as through compensatory time off arrangements, rather than time and half overtime pay, and through other local governmental agreements.[3]

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[2] *See, e.g.*, "If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation." 392 U.S. at 197.

[3] California, for example, has a mutual aid program, through which counties cooperate to provide aid in time of floods and other disasters. The municipalities and counties participate gratuitously, without reimbursement. Counsel for California fear that the overtime pay provisions of the Amendments will prove so burdensome that counties will be unwilling to continue to cooperate in this venture.

Also, compensatory time-off arrangements which allow for heavy working seasons during the summer, for forest fire fighters, or during the winter, for snow removal personnel, may be prohibited by the provisions requiring overtime payment. California, for example, represents that its forestry service employees are under special arrangements for the 5-8 month forest fire campaign program, which are dependent as a practical matter on a compensatory time off arrangement during the winter months. Salt Lake City fears it may not be able to continue its practice of working its snow removal employees some 7,000 hours in excess of 40 hours per week during the winter with an equal amount of time off during the summer, despite the apparent acceptability of this arrangement to both employer and employees.

Plaintiffs contend that the amendments will mean either increase in local government fiscal requirements, or reduction in services and personnel, with layoffs, or both, due to provisions in state and municipal constitutions, charters, statutes and ordinances, like those against deficit financing. Plaintiffs further contend that a large part of the budgets of state and local governments reflect costs of non-supervisory personnel, and that the budgeting processes currently under way indicate that the amendments may have the practical impact of a large scale reconstitution of tours of duty, without any factual predicate showing that there has been in the past any substantial degree of either widespread labor unrest curtailing flow of interstate commerce or substandard wage scales. They contend that the amendments here will intrude upon the state's performance of essential governmental functions far more than did those reviewed in *Wirtz*, although here, as there, the federal requirements are nominally limited to wage and hour regulations. We are troubled by these contentions, and consider that they are substantial and that it may well be that the Supreme Court will feel it appropriate to draw back from the far-reaching implications of *Wirtz*; but that is a decision that only the Supreme Court can make, and as a Federal district court we feel obliged to apply the *Wirtz* opinion as it stands.

If, as we must assume, the amendments are constitutional, a preliminary injunction would be inappropriate. We have prondered the possibility of relief pending appeal, to assure opportunity to litigate, but, apart from jurisdictional doubts, we apprehend that the only assistance available from such refief would be this, that states failing to comply with the new provisions

would not be exposed to the liquidated damages and double damage penalties provided for bad faith violations of the Act. However, we feel that since our opinion recognizes that plaintiffs have raised a substantial question regarding the amendments' constitutionality, this will be sufficient to indicate that the claim of the part of the cities and states that the Act cannot be constitutionally enforced has been raised in good faith.

Plaintiffs' request for declaratory and preliminary injunctive relief is denied. Defendant's motion for dismissal is hereby granted. Because the papers before us include depositions and affidavits, and they should be part of the record in the event of an appeal to the Supreme Court, our order dismissing the complaint will be entered under both Rule 12 and Rule 56 of the Federal Rules of Civil Procedure.

The foregoing will constitute our findings of fact and conclusions of law.

Accordingly, it is hereby ORDERED, pursuant to and in accordance with Rules 12 and 56 of the Federal Rules of Civil Procedure, that the complaint of the National League of Cities, et al., as amended December 31, 1974, and the complaint in intervention of the State of

California, be, and they hereby are, dismissed with prejudice.

/s/ Harold Leventhal
Harold Leventhal
United States Circuit Judge

/s/ Oliver Gasch
Oliver Gasch
United States District Judge

/s/ Barrington D. Parker
Barrington D. Parker
United States District Judge

December 31, 1974

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Supreme Court, U. S.
FILED
22
JAN 1975
MICHAEL RODAK, JR., CLERK

Nos. 74-878 and 74-879

In the Supreme Court of the United States

OCTOBER TERM, 1974

THE NATIONAL LEAGUE OF CITIES, ET AL., APPELLANTS

v.

PETER J. BRENNAN, SECRETARY OF LABOR

THE STATE OF CALIFORNIA, APPELLANT

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

ROBERT H. BORK,
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ALLAN ABBOT TUTTLE,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

WILLIAM J. KILBERG,
Solicitor of Labor,
CARIN ANN CLAUSS,
Associate Solicitor,
JACOB I. KARRO,
DARRYL J. ANDERSON,
Attorneys,
Department of Labor,
Washington, D.C. 20210.

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CITATIONS

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Edelman v. *Jordan*, 415 U.S. 651	26
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Mitchell v. *Pilgrim Holiness Church Corp.*, 210 F. 2d 879, certiorari denied, 347 U.S. 1013	16

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National Labor Relations Board v. *Central Disp. & E. Hosp.*, 145 F. 2d 852, certiorari denied, 324 U.S. 847 — 16
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Parden v. *Terminal R. Co.*, 377 U.S. 184 — 19
Powell v. *U.S. Cartridge Co.*, 339 U.S. 497 — 16
Public Building Authority of Birmingham v. *Goldberg*, 298 F. 2d 367 — 16
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Shultz v. *Instant Handling, Inc.*, 418 F. 2d 1019 — 14
United States v. *California*, 297 U.S. 175 — 18, 19, 26
United States v. *Darby*, 312 U.S. 100 — 16, 26
Walling v. *Helmerich & Payne*, 323 U.S. 37 — 21
Walling v. *Jacksonville Paper Co.*, 317 U.S. 564 — 15
Walling v. *Portland Terminal Co.*, 330 U.S. 148 — 24
Walling v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419 — 21

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Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*: — 2, 4
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29 U.S.C. (1970 ed.) 213(a)(1) — 6
29 U.S.C. (1964 ed.) 203(d) — 5
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29 U.S.C. (1964 ed.) 203(s) — 5
29 U.S.C. (1964 ed.) 206(b) — 5
29 U.S.C. (1964 ed.) 207(a)(2) — 5
29 U.S.C. (1940 ed.) 203(d) — 4
29 U.S.C. (1940 ed.) 206(a) — 4
29 U.S.C. (1940 ed.) 207(a) — 4
29 U.S.C. (1940 ed.) 207(b) — 4
29 U.S.C. (1940 ed.) 211(c) — 4
29 U.S.C. (1940 ed.) 212 — 4
Fair Labor Standards Amendments of 1966, 80 Stat. 830 — *passim*
Fair Labor Standards Amendments of 1974, P.L. 93–259, 88 Stat. 55, *et seq* — *passim*
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Background Material on the Fair Labor Standards Act Amendments of 1973, 93d Cong., 1st Sess. 8, 13, 22

Burton and Krider, *The Incidence of Strikes in Public Employment*, Conference on Labor in Nonprofit Industry and Government, Princeton University (May 1973) 13

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120 Cong. Rec. S2519 (daily ed., February 28, 1974) 13

120 Cong. Rec. S4692 (daily ed., March 28, 1974) 25

Executive Office of the President, Office of Management and Budget, *Special Analyses, Budget of the United States Government* (Washington, D.C., 1974) 11

Hearings before the General Subcommittee on Labor of the House Committee on Education and Labor, on H.R. 10498 and H.R. 17596, 91st Cong., 2d Sess. 13

Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on S. 1861 and S. 2259, 92d Cong., 1st Sess. 13

H. Rep. No. 87–75, 87th Cong., 1st Sess. 16

H. Rep. No. 89–871, 89th Cong., 1st Sess. 21–22

H. Rep. No. 93–913, 93d Cong., 2d Sess. 13, 20, 22

Miscellaneous—Continued Page

Nonsupervisory Employees in State and Local Governments, U.S. Department of Labor, Workplace Standards Administration, 1971 Report to Congress 15, 22

S. Rep. No. 87–145, 87th Cong., 1st Sess. 16

S. Rep. No. 89–1487, 89th Cong., 2d Sess. 21

S. Rep. No. 93–690, 93d Cong., 2d Sess. 5, 12, 13

S. Rep. No. 93–758, 93d Cong., 2d Sess. 25

University of California Institute of Government Studies, *Strikes by Public Employees and Professional Personnel: A Bibliography* (June 1967) 14

U.S. Department of Commerce, Bureau of Census, *Public Employment in 1973* 6, 14

White, "Work Stoppages of Government Employees," *Monthly Labor Review* (December 1969) 14

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-878

THE NATIONAL LEAGUE OF CITIES, ET AL., APPELLANTS

v.

PETER J. BRENNAN, SECRETARY OF LABOR

No. 74-879

THE STATE OF CALIFORNIA, APPELLANT

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the appellee moves to affirm the judgment of the three-judge district court on the ground that the issues raised by appellants were conclusively decided by this Court in *Maryland* v. *Wirtz,* 392 U.S. 183.

JURISDICTION

This action seeks to enjoin, as unconstitutional, enforcement of the 1974 amendments to the Fair Labor Standards Act of 1938 (P.L. 93–259, 88 Stat. 55, amending 29 U.S.C. 201, *et seq.*), insofar as those amendments apply to State and local governments. It was filed on December 12, 1974, and assigned to a three-judge district court pursuant to 28 U.S.C. 2284. The judgment of the three-judge district court granting appellee's motion for summary judgment was entered on December 31, 1974. The notice of appeal of appellants National League of Cities, *et al.*, was filed on December 31, 1974, and their application for a stay pending the appeal was granted that same day by an interim order of the Chief Justice. The stay was continued by this Court on January 13, 1975, on condition that appellants National League of Cities, *et al.* file their jurisdictional statement on or before January 17, 1975. The jurisdictional statement of appellants National League of Cities, *et al.* was filed on January 17, 1975.

The notice of appeal of the State of California was filed on January 8, 1975. Their jurisdictional statement was filed on January 17, 1975.

The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

QUESTION PRESENTED

In *Maryland* v. *Wirtz*, 392 U.S. 183, this Court sustained, against constitutional challenges, the 1966 amendments to the Fair Labor Standards Act of 1938 (Act), 80 Stat. 830, which extended the Act's

basic wage and hour standards to 2.9 million public school, hospital and transit employees. The 1974 amendments to the Act, 88 Stat. 55, extend the Act's basic wage and hour standards to an additional 3.4 million employees of the several States and their political subdivisions.

The question is whether the 1974 amendments exceeded Congress' power under the Commerce Clause.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitution of the United States provides in pertinent part:

Article I, Section 8:

The Congress shall have Power * * *

* * * * *

To regulate Commerce * * * among the several States * * *;

Article VI:

* * * * *

This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.

Tenth Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Eleventh Amendment:

The Judicial power of the United States shall not be construed to extend to any suit in law

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> or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fair Labor Standards Amendments of 1974 are set forth as Appendix B to the Jurisdictional Statement of appellants National League of Cities, *et al.* (J.S. App. 1b–21b).[1]

STATEMENT

The Fair Labor Standards Act, as originally enacted in 1938, required employers covered by the Act to pay those of their employees who were engaged in commerce or in the production of goods for commerce a minimum wage, as well as one and one-half times their regular rate of pay for hours worked in excess of 40 a week; to keep records necessary or appropriate for the enforcement of the Act; and to comply with certain child labor standards (29 U.S.C. (1940 ed), 206(a), 207(a) and (b), 211(c), 212). The States and their political subdivisions were specifically excluded from the Act's coverage (29 U.S.C. (1940 ed.) 203(d)).

In 1961, Congress extended the coverage of the Act, beyond employees themselves engaged in commerce or in the production of goods for commerce, to all employees of certain "enterprises" which had some employees so engaged (29 U.S.C. (1964 ed.) 203(r), 203(s), 206(b), 207(a)(2)). The States and their political subdivisions remained among the employers specifically excluded from the Act's coverage (29 U.S.C. (1964 ed.) 203(d)).

[1] "J.S." refers to the Jurisdictional Statement in No. 74–878, filed by the National League of Cities, *et al.*; "Calif. J.S." refers to the Jurisdictional Statement in No. 74–879, filed by the State of California.

In 1966, Congress extended the Act's coverage (including the prohibition against sex-based wage differentials added by the Equal Pay Act of 1963) to 2.9 million employees of State and other public enterprises engaged in operating transit companies, hospitals, schools, and related institutions (29 U.S.C. (1970 ed.) 203(d), 203(r)(1) and (2), 203(s)(1) and (4), 206(d)). Except to this extent, "any State or political subdivision of a State" was excluded from the Act's definition of an "Employer" (29 U.S.C. (1970 ed.) 203(d)). The constitutionality of this extension of the Act's provisions to the States and their political subdivisions was upheld in *Maryland* v. *Wirtz*, 392 U.S. 183.

In 1974 Congress amended the Act[2] to cover an additional 3,386,000 employees of the States and their political subdivisions.[3] This extension of coverage was

[2] The 1974 amendments became effective on May 1, 1974. The overtime provisions for employees engaged in fire protection and law enforcement activities did not, however, become effective until January 1, 1975.

The 1974 amendments also extended the provisions of the Age Discrimination in Employment Act of 1967 to all State and local government employees, except those who are elected or appointed by elected officials to their personal staffs or to policy making positions.

[3] S. Rep. No. 93–690, 93d Cong., 2d Sess., p. 16. Appellants incorrectly state that the 1974 amendments extend the Act to 11.4 million nonsupervisory State and local government employees (J.S. 5, 20). The 11.4 million figure is the total employ-

accomplished by removing the exclusionary language from the Act's definition of "Employer" and by adding to it the phrase "public agency" (29 U.S.C. 203 (d); J.S. App. 4b). "Public agency" in turn was defined to include "the government of a State or political subdivision thereof" (29 U.S.C. 203(x); J.S. App. 5b). The definition of an "Enterprise engaged in commerce or in the production of goods for commerce" was amended to include "an activity of a public agency" (29 U.S.C. 203(s); J.S. App. 5b). That amendment continues (*ibid.*):

> The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

In addition to the Act's general exemption from coverage of "executive, administrative or professional" personnel (29) U.S.C. 213(a)(1)), the 1974

ment of State and local governments, including supervisory employees and others within the Act's several exemptions as well as employees already covered under preexisting law held constitutional in *Maryland* v. *Wirtz*, *supra*. Thus, of the 11.4 million employees, 6.9 million are employed by schools, hospitals and transit companies and therefore are covered (except 4.0 million who are exempt) without regard to the 1974 amendments. Of the remaining 4.5 million, 3.4 million were brought under the Act by the 1974 amendments, the others being exempt (*e.g.*, as supervisory or professional employees, or as employees of certain seasonal recreational establishments). See U.S. Department of Commerce, Bureau of Census, *Public Employment in 1973*, p. 9.

amendments specifically exclude from coverage any individual who "holds a public elective office" or is appointed by such an officeholder to be a "member of his personal staff" or "to serve on a policymaking level," or to advise the officeholder "with respect to the constitutional or legal powers of his office" (29 U.S.C. 203(e)(2)(C); J.S. App. 4b).

The Act's minimum wage and overtime requirements, which are generally lower than those for private employers, are self-executing and do not depend upon the prior issuance of any rules or regulations (29 U.S.C. 206(b), 207(k), 213(b)(20); J.S. App. 1b, 5b, 6b). The Secretary is not authorized to add any additional requirements not already applicable to private employers.[4]

On December 12, 1974, appellants National League of Cities, *et al.*, sued in the United States District

[4] The "800 pages of Regulations" referred to by appellants (J.S. 8) are a codification of pertinent Federal Register documents relating to several different programs of various agencies (29 C.F.R. Parts 500 to 1899). Only some of the documents relate to the statutes here in question (the Fair Labor Standards and Age Discrimination in Employment Acts) and, of these, only a small part, as appellants themselves concede, even remotely concerns the States and local governments. Moreover, with the exception of the Department of Labor's regulations on recordkeeping and hazardous child labor, its rulings and interpretations do not impose additional requirements on employers, as mistakenly assumed by the court below. Instead, they implement (in the case of the exemption for executive, administrative and professional employees) or explain (in the case of the Act's overtime exemptions, including the partial exemption provided by Section 7(k) for fire protection and law enforcement personnel) sections of the Act which, if invoked, would relieve employers from certain of the Act's requirements.

Court for the District of Columbia to enjoin the enforcement of the 1974 amendments insofar as they apply to States and local governments.[5] A three-judge district court was convened and, on December 30, 1974, heard oral argument on appellants' motion for preliminary relief and appellee's motion to dismiss.[6] The court granted appellee's motion on December 31, 1974, on the ground that this case "is controlled by the

[5] Appellants seek not only to enjoin the application of the Act to employees not previously covered, but also to enjoin application of the new minimum wage rates for employees who were first covered by the 1966 a' ·endments upheld in *Maryland* v. *Wirtz*, *supra*. That these previously covered employees need the protection of the new minimum wage rates ($1.90 until January 1, 1975, and $2.00 thereafter) is clear from a 1973 report prepared for Congress which showed that 314,000 of the 2.9 million public employees covered by the 1966 amendments were paid less than $1.80 in September 1973 (Background Material on the Fair Labor Standards Act Amendments of 1973, 93d Cong., 1st Sess., p. 220).

[6] The court held no evidentiary hearing and made no factual findings. The court's comments on what it erroneously assumed to be regulations and on dollar impact, as well as on the nature of the activities covered by the 1974 amendments (J.S. App. 7a) are simply a repetition of appellants' allegations and are in no sense evidentiary findings. The allegations were not documented by economic or other objective evidence.

Appellants offered no testimony at the argument on December 30, 1974, nor did they request an evidentiary hearing. The government offered two depositions demonstrating that the officers of the two national organizations who verified the complaint did not have knowledge of facts to support the claims of impact. The matters considered by the Court included the two depositions; two affidavits of Jack I. Karlin of the Labor Department, and other exhibits, among which were letters from states and localities which the persons who verified the complaint could not amplify or explain.

decision of the Supreme Court in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968)" (J.S. App. 6a).

ARGUMENT

The issues raised by appellants were all resolved by this Court only six years ago, with respect to the same statute, in *Maryland* v. *Wirtz*, 392 U.S. 183; there are no significant differences between this case and *Maryland*; and *Maryland* itself is soundly based on an unbroken line of Commerce Clause decisions.

Appellants claim that the 1974 amendments are a "seizure of control over nearly all State and City employees" and "the take-over of 80 to 85% of State and City budgets" (J.S. 9, 10). As this Court noted in *Maryland* v. *Wirtz*, in rejecting a similar contention, "[s]ince the argument is made in terms of interference with 'sovereign state functions,' it is important to note exactly what the Act does" (392 U.S. at 193). In *Maryland*, this Court found the contention "not factually accurate," since "Congress has 'interfered with' these state functions only to the extent of providing that when a State employs people in performing such functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce * * *" (392 U.S. at 193–194). Appellants' claims similarly are "not factually accurate"; the present Act, like the 1966 Act, interferes with state and city functions only to the extent that it requires "a minimum wage and maximum limit of hours unless overtime wages are paid, and does not otherwise affect the way in which * * * duties are performed" (392 U.S. at 193).

We will first demonstrate that the State and local government functions covered by the 1974 amendments affect commerce in the same way that the activities covered by the 1966 amendments were found by this Court to affect commerce. Secondly, we show that, under *Maryland* v. *Wirtz*, State and local government functions, such as those affected by the 1974 amendments, are not immune from congressional regulation.

A. THE COVERED ACTIVITIES OF STATE AND LOCAL GOVERNMENTS AFFECT COMMERCE

1. The 1966 amendments to the Fair Labor Standards Act extended the Act's wage and hour standards to cover 2.9 million public school, hospital and transit workers. This Court, in *Maryland* v. *Wirtz*, stated, "[i]t is clear that labor conditions in schools and hospitals can affect commerce" (392 U.S. at 194). The Court noted the billions of dollars spent on education and the millions of dollars of interstate purchases (*ibid.*). The Court added that "[s]trikes and work stoppages involving employees of schools and hospitals, events which unfortunately are not infrequent, obviously interrupt and burden this flow of goods across state lines" (392 U.S. at 195; footnote omitted). From this, the Court concluded, "[i]t is therefore clear that a 'rational basis' exists for congressional action prescribing minimum labor standards for schools and hospitals, as for other importing enterprises" (392 U.S. at 195).[7]

[7] The Court added the following footnote (*ibid.*):

"[26] Both under the present Act and the National Labor Relations Act, numerous cases have held that the engagement of an enterprise in interstate commerce may consist of importation. *E.g.*, *Wirtz* v. *Hardin & Co.*, 253 F. Supp. 579, aff'd, 359 F. 2d 792 (FLSA); *N.L.R.B.* v. *Baker Hotel*, 311 F. 2d 528 (NLRA)."

Appellants attempt to distinguish *Maryland* v. *Wirtz* by contending that the public agencies covered by the 1974 amendments—unlike those covered by the 1966 amendments—are not in competition with the private sector (J.S. 12–14, 22, 24, 28). But even if this were so (which has not been established, *infra*, pp. 14–15), this Court's finding of a rational basis for congressional action in *Maryland* v. *Wirtz* was not based upon the existence of competition between public and private employers. The finding of an effect upon commerce rested upon the large commitment of funds to the covered enterprises, their substantial importation of goods, and the effect of their labor disputes upon the flow of such goods.

All of these considerations apply with even greater force to the State and local government functions covered by the 1974 amendments. As the district court noted, these agencies "make substantial purchases in interstate commerce of equipment and other goods" (J.S. App. 7a). Indeed, in 1971 State and local governments made purchases of 135 billion dollars (119 Cong. Rec. S14057 (daily ed., July 19, 1973)).[8] The

[8] Another measure of the involvement of State and local government agencies in commerce is the flow of federal funds. "In 1975, Federal aid to State and local governments is expected to total $52.0 billion * * *." Executive Office of the President, Office of Management and Budget, *Special Analyses, Budget of the United States Government*, p. 203 (Washington, D.C., 1974). "In total, Federal aid will finance about 22% of State and local expenditures in 1975" (*id.* at 205).

Senate Report on the 1974 amendments states (S. Rep. No. 93–690, 93d Cong., 2d Sess., p. 24):

> The Committee believes that there is no doubt that the activities of public sector employers affect interstate commerce and therefore that the Congress may regulate them pursuant to its power to regulate interstate commerce. Without question, the activities of government at all levels affect commerce. Governments purchase goods and services on the open market, they collect taxes and spend money for a variety of purposes. In addition, the salaries they pay their employees have an impact both on local economies and on the economy of the nation as a whole. The Committee finds that the volume of wages paid to government employees and the activities and magnitude of all levels of government have an effect on commerce as well.

There is no question that labor disputes involving public agencies affect the flow of commerce. Congress' finding in 1938 that substandard labor conditions "lead * * * to labor disputes burdening and obstructing commerce and the free flow of goods in commerce" (29 U.S.C. 202(a)(4)) is equally applicable to the public agencies covered by the 1974 amendments. In considering the 1974 amendments Congress had before it evidence of the existence of substandard labor conditions in State and local governments. An estimated 409,000 State and local government employees were paid less than $1.90 an hour in 1973 [9]—at a time when

[9] The 409,000 figure is reached by adding to the 314,000 employees covered by the 1966 amendments, earning less than $1.80 an hour in September 1973, the 95,000 employees that

the poverty level income for an urban family of four was $4,540 or approximately $2.27 an hour.[10] Ten percent of the nonsupervisory State and local government employees (including 20 percent of the police and fire employees) worked more than 40 hours a week.[11]

Moreover, there is no doubt that labor conditions in public agencies other than schools and hospitals had led to strikes and work stoppages that burdened interstate commerce. During the hearings on these amendments, there was testimony concerning the growing frequency of labor disputes and strikes among public employees.[12] In 1970, excluding educational institutions and State agencies, there were 197 work stoppages by local government employees, resulting in a loss of 289,300 man-days of work. Burton and Krider, *The Incidence of Strikes in Public Employment,* Conference on Labor in Nonprofit Industry and Government, Princeton University (May 1973), Table 3, p. 6. There were 409 work stoppages among all categories of State and local government employees,

Congress proposed to cover additionally when the minimum was raised to $1.90 an hour. See, Background Material on the Fair Labor Standards Act Amendments of 1973, 93d Cong., 1st Sess., p. 220; H. Rep. No. 93–913, 93d Cong., 2d Sess., p. 28.

[10] S. Rep. No. 93–690, *supra*, at p. 8.

[11] H. Rep. No. 93–913, *supra*, at p. 29.

[12] Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on S. 1861 and S. 2296, 92d Cong., 1st Sess., p. 366; Hearings before the General Subcommittee on Labor of the House Committee on Education and Labor, on H.R. 10498 and H.R. 17596, 91st Cong., 2d Sess., pp. 53, 59; 120 Cong. Rec. S2518 (daily ed., February 28, 1974) (Statement by Senator Javits).

resulting in a loss of 1,375,100 man-days of work (*id.* at Table 2, p. 4). See also White, "Work Stoppages of Government Employees," *Monthly Labor Review* (December 1969), pp. 29–34; University of California Institute of Government Studies, *Strikes by Public Employees and Professional Personnel: A Bibliography* (June 1967).

2. Even assuming that competition between public and private enterprises was relevant to the Court's analysis of the effect of the covered activities on interstate commerce in *Maryland* v. *Wirtz* (see J.S. 12–14), it is apparent that a large number of the public employees brought within the Act by the 1974 amendments are engaged in activities which compete as much with the private sector as do the schools and hospitals which this Court considered in that case. These employees work for gas and electric companies, recreation facilities, trash collection agencies, airports, liquor stores, libraries, and the like—all of which, in the absence of the 1974 amendments, would have a competitive advantage.[13] *Public Employment in 1973, supra,* at p. 9. These newly covered public employees are, moveover, employed in the same kinds of occupations as covered employees in the private sector: *e.g.,* custodial workers, dock sweepers, laborers, groundkeepers, laundry workers, cooks, food service workers, elevator operators, bridge tenders, library

[13] See, *e.g., Shultz* v. *Instant Handling, Inc.*, 418 F. 2d 1019 (C.A. 5) (trash removal company); *General Electric Co.* v. *Porter*, 208 F. 2d 805 (C.A. 9) (fire protection company). Some municipalities contract with private companies to perform their fire protection services.

aides, home service aides, community workers, farm and dairy hands, messengers, building guides, etc. *Nonsupervisory Employees in State & Local Governments,* U.S. Department of Labor, Workplace Standards Administration, 1971 Report to Congress, pp. 52–57.

3. California makes the additional argument that its employees are not "engaged in commerce or in the production of goods for commerce" because their "activities * * * are purely intrastate in nature" (Calif. J.S. 13), citing *Kirschbaum Co* v. *Walling,* 316 U.S. 517, and *Walling* v. *Jacksonville Paper Co.,* 317 U.S. 564. These cases, however, were decided before the Act's original coverage provisions[14] were broadened by the 1961, 1966 and 1974 amendments to cover not only those employees who are themselves engaged in commerce but also those employees who are employed in an enterprise which has a prescribed relationship to interstate commerce. As this Court explained the expanded coverage of the Act in *Brennan* v. *Arnheim & Neely, Inc.,* 410 U.S. 512, 516–517:

> The concept of "enterprise" under the Fair Labor Standards Act * * * substantially broadened the coverage of the Act. Rather than confining the protections of the Act to employees who were themselves "engaged in commerce or in the production of goods for commerce" [citations omitted], the new amendments brought those "employed in an enterprise

[14] These original coverage provisions were "not coextensive with the limits of the power of Congress over commerce" (*Kirschblaum Co., supra,* 316 U.S. at 523).

> engaged in commerce" within the ambit of the minimum wage and maximum hours provisions.

To be covered, an "enterprise" need not itself engage in the production of goods for commerce or perform any activities of a business nature; it may receive, handle and consume such goods.[15] As Congress noted, the "demand for a product causes its interstate movement quite as surely as does production" (see 107 Cong. Rec. 6236), and the resulting consumption of goods is an important factor in maintaining the flow of goods. See S. Rep. No. 87–145, 87th Cong., 1st Sess., p. 3; H. Rep. No. 87–75, 87th Congress, 1st Sess., p. 3. The federal commerce power "is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end * * *." *United States* v. *Darby,* 312 U.S. 100, 118.

[15] The Act has always applied to non-business and non-profit activities, including those which are governmental in nature. See, *e.g., Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497 (employees producing war materials at a government-owned plant); *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F. 2d 879 (C.A. 7), certiorari denied, 347 U.S. 1013 (employees of a church who were engaged in printing religious materials); and *Public Building Authority of Birmingham* v. *Goldberg*, 298 F. 2d 367 (C.A. 5) (government employees engaged in processing claims for the payment of Social Security benefits were engaged in consumer-related activities). See also *National Labor Relations Board* v. *Central Disp. & E. Hosp.*, 145 F. 2d 852 (C.A.D.C.), certiorari denied, 324 U.S. 847, holding that the National Labor Relations Act, as then worded, applied to a non-profit charitable hospital.

B. THE EXTENSION OF THE FAIR LABOR STANDARDS ACT TO PUBLIC AGENCIES IS A VALID EXERCISE OF THE COMMERCE POWER AND DOES NOT VIOLATE THE TENTH AMENDMENT

1. In asserting that the 1974 amendments are an unconstitutional "take-over" of State and local government budgets and personnel (J.S. 5, 10), appellants advance an argument decisively rejected by this Court in *Maryland* v. *Wirtz, supra.* There too, the appellants argued that the extention of coverage to public schools and hospitals presaged "the utter destruction of the State as a sovereign political entity" (Brief for Appellants, No. 742, O.T. 1967, p. 10). As we have seen (*supra,* p. 9), the Court found that these alarms were not "factually accurate." We shall show (*infra,* pp. 19–25) that appellants' contentions here are similarly factually inaccurate. But it is important to note at the outset that *Maryland* v. *Wirtz* decisively disposed of the claim that the "[commerce] power must yield to state sovereignty in the performance of governmental functions" (392 U.S. at 195). The Court held that:

> it will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States for the benefit of their citizens. [392 U.S. at 198–199.]

Similarly, the Court noted that "valid general regulations of commerce do not cease to be regulations of commerce because a State is involved" (392 U.S. at 196–197).

These observations in *Maryland* v. *Wirtz* reflect the uniform decisions of this Court that Congress may regulate State activities that have a substantial effect upon commerce. Two examples cited in *Maryland* will suffice. In *Sanitary District* v. *United States*, 266 U.S. 405, the United States sued to enjoin the diversion of water from Lake Michigan to dispose of sewage from Chicago, claiming that the diversion conflicted with the power of the United States to regulate interstate commerce. The Court stated (266 U.S. at 426) that the power and authority of the United States to remove obstructions to interstate and foreign commerce was, without question, "superior to that of the States to provide for the welfare or necessities of their inhabitants." Similarly, in *United States* v. *California*, 297 U.S. 175, the Court upheld the application of the federal Safety Appliance Act to a wholly intrastate non-profit railroad operated by California to facilitate transportation to a port. The Court said (297 U.S. at 185):

> * * * [W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.

Although appellants contend that the 1974 amendments interfere with "essential Government services" and "unique sovereign governmental functions" (J.S. 14, 15), *Maryland* v. *Wirtz* established "that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character" (392 U.S. at 195). The schools and hospitals covered by the 1966 amendments were as much "essential Government services" as any of the public agencies covered by the 1974 amendments.[16] The statement in *Maryland* that the characterization of an activity as "governmental" does not affect Congress' power followed established constitutional doctrine. Thus, although the State activities in the California railroad case were of a commercial nature, the Court deemed it "unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity" (*United States* v. *California*, *supra*, 297 U.S. at 183). In *Sanitary District*, *supra*, the disposal of Chicago's sewage was not a commercial function, but a governmental health measure.

2. Rather than constituting a "take-over" of State and local government budgets and personnel, as appellants contend (J.S. 5, 10), the 1974 amendments extend the Act's coverage to the same type of employees as were initially covered by the 1966 amend-

[16] Cf. *Employees* v. *Missouri Public Health Department*, 411 U.S. 279, 296 (Marshall, J., concurring in the result). The opinion of the Court in that case (411 U.S. at 284) distinguished *Parden* v. *Terminal R. Co.*, 377 U.S. 184, by stating that "*Parden* was in the area where private persons and corporations normally ran the enterprise," whereas, in the case of State mental hospitals, "the public sector took over." The Court said:

"State mental hospitals, state cancer hospitals, and training schools for delinquent girls which are not operated for profit are not proprietary."

ments: *viz.,* non-supervisory civil service employees who are neither elected nor appointed to policymaking positions or to the personal staffs of elected officials. The 1974 extension, like that of 1966, "establishes only a minimum wage and maximum limit of hours unless overtime wages are paid" (*Maryland* v. *Wirtz, supra,* 392 U.S. at 193). Like the 1966 Act, the 1974 Act "does not otherwise affect the way in which * * * [public agencies'] duties are performed" (*ibid.*).

Appellants err in contending that the 1974 amendments would require that "public employees * * * all work for the same pay and under precisely the same conditions" (J.S. 17). The minimum wage requirements do nothing more than set a floor below which wages may not fall; they require only that the wage be at least $1.90 (now $2.00) an hour. Even this minimum obligation does not affect all public employees, but only the relatively small number (approximately 3.6 percent) that was being paid less than the specified minimum (*supra,* pp. 12–13).[17] Indeed, most of

[17] Appellants err in stating that "[t]he Act was made applicable to States and Cities under false representations in congressional reports that it would have no significant impact upon States and Cities since the pay they provide exceeds the minimum wages required by the Act" (J.S. 8). The language quoted by appellants from the House Report merely stated that the wage levels for the State and local government employees who were to be covered by the proposed amendments were generally higher than the wage levels for the State and local government employees who were covered by the 1966 amendments. H. Rep. No. 93–913, 93d Cong., 2d Sess., pp. 28–29.

these employees (an estimated 314,000 out 409,000) are among those who were first covered by the 1966 amendments.[18]

Nor do the Act's overtime requirements "determine * * * what hours may be worked by employees of State and City Governments" (J.S. 16). The only restriction—which is the same restriction as that of the 1966 amendments—is that, except where an overtime pay exemption is provided, the employer must pay a premium rate for the hours worked in excess of 40. This premium rate can be avoided if the employer uses new employees to do the overtime work. This, in effect, tends to discourage overtime work and to spread employment, which is the result Congress intended. *Walling* v. *Helmerich & Payne,* 323 U.S. 37, 42; *Walling* v. *Youngerman-Reynolds Hardwood Co.,* 325 U.S. 419, 423–424.

While appellants object to this interference with their practice of using full-time workers in various government jobs (J.S. 6, referring to Complaint ¶¶ 29 and 46), the spreading of employment is no less valid an objective of national labor policy in the sector of public employment than in the sector of private employment, as Congress noted. S. Rep. No. 89–1487, 89th Cong., 2d Sess., p. 22; H. Rep. No. 89–871, 89th

[18] In this respect, the 1974 amendments are quite different in their impact from the Economic Stablization Act of 1970 (84 Stat. 799, now repealed), which imposed controls on the wages of *all* State and local government employees, and not just on those few who were paid less than a minimum living wage. See *Fry* v. *United States,* No. 73–822, pending decision of this Court; see also *Coan* v. *California,* 113 Cal. Rptr. 187, 203, (Sup. Ct.), 520 P.2d 1003, 1019 (dissenting opinion).

Cong., 1st Sess., pp. 30–31; Background Material on the Fair Labor Standards Act Amendments of 1973, *supra,* at p. 298; 112 Cong. Rec. 11282, 11284, 20481, 22652. In any event, as the Court said with respect to a similar complaint about the overtime provisions of the 1966 amendments, these "are matters outside the judicial cognizance" (*Maryland* v. *Wirtz, supra,* 392 U.S. at 194, n. 22).

Also, contrary to appellants' assertion (J.S. 7, 10), the minimum wage and overtime requirements of the 1974 amendments are not a "take-over of 80 to 85% of State and City budgets." The increased costs of these requirements (assuming that employment is not spread to avoid overtime) will amount to less than two percent of the total wage costs.[19] These wage costs

[19] For example, an increase in the minimum wage to $1.80 in 1973 would have cost the State and local governments an estimated $128 million a year, which represented an increase of only 0.3 percent in their total wage bill. Background Material on the Fair Labor Standards Act Amendments of 1973, 93d Cong., 1st Sess., p. 220. The estimated increase for overtime compensation was 1.0 percent, but in actual effect it would be less since more than 40 percent of the employees are already entitled to premium overtime pay under State or local laws or ordinances. H. Rep. No. 93–913, 93d Cong., 2d Sess., pp. 28–29; *Nonsupervisory Employees in State & Local Governments, supra,* at pp. 25 and A–46, Table 44. Appellants' cost figures (J.S. 7) are only stated in dollar amounts and do not show the percentage by which their wage costs would be increased. Moreover, 80 percent of their $200 million estimate for fire departments is based on the explicit assumption that numerous local governments will fail to take advantage of the partial overtime exemption provided by Section 7(k) of the Act. See Letter from William F. Danielson, Director of Personnel, City of Sacramento, to Charles S. Rhyne, dated December 24, 1974, and the two affidavits prepared by appellee's Director of the Branch of Evaluation and Research, Mr. Jack I. Karlin. The actual cost of the partial application of the Act's overtime requirement to fire departments (assuming that all the jurisdictions take advantage of the Section 7(k) exemption) is, according to appellants' own figures $30,499,000 (Danielson letter), which is not too different from the Department of Labor's estimate of $27,000,000 (29 C.F.R. Part 553; J.S. App. 2c).

are not, as California contends (Calif. J.S. 10), paid with funds raised entirely by local government. Federal aid, as already noted (*supra,* p. 11, n. 8), "will finance about 22% of State and local expenditures in 1975."

In any event the validity of the 1974 amendments is not affected because "[they] may place new * * * fiscal burdens on the States" (*Employees* v. *Missouri Public Health Department, supra,* 411 U.S. at 284). Such considerations "raise not constitutional issues, but questions of policy. They relate to the wisdom, need, and effectiveness of a particular project. They are therefore questions for the Congress, not the Courts" (*Oklahoma* v. *Guy F. Atkinson Co.,* 313 U.S. 508, 527). As this Court noted in *Sanitary District* v. *United States, supra,* 266 U.S. at 432, "* * * we are not at liberty to consider them here as against the edict of a paramount power."

Nor do the 1974 amendments authorize the issuance of any regulations which would impose *additional* requirements upon the State and local governments. None of the Department of Labor's regulations (see n. 4, p. 7, *supra*) prohibits the use of volunteers or requires that all training time be paid for (see J.S. 32). The Act does, of course, require employers to pay

for all required work, and this would include "training time" and "mutual aid" if such activities are required by the employer. On the other hand, if the mutual aid is performed voluntarily, individuals rendering such aid are not employees, but volunteers, and their hours need not be paid for.[20]

Finally, the additional provisions applicable to public police and fire agencies (29 U.S.C. 207(k); J.S. App. 5b–6b) do not add to the burden of compliance. They are designed to facilitate compliance. Thus, unlike private employers, these public agencies are authorized, at their option, to omit overtime pay for work between 40 and 60 hours in the workweek, or to substitute "compensatory time" for such hours, and even for work in excess of 60 hours in a particular week if the excess hours are balanced out by shorter

[20] Contrary to appellants' statement (J.S. 32), the Department of Labor does not take the position that the payment of a nominal sum converts a volunteer into an employee, since it assumes that such a sum would be in lieu of reimbursement (see 29 C.F.R. 553.11(a); J.S. App. 8c). In any event, the question whether an individual is an employee or a volunteer is ultimately one for the courts, and is not a matter for "final decision" (J.S. 21, n. 5) by either the Department or the employer. See, *e.g.*, *Walling* v. *Portland Terminal Co.*, 330 U.S. 148. Similarly, wages must be paid for training only if the training is required as a condition of employment, in which event the compensable time is limited to time spent in actual training. Other training which employees may take to improve their performance or to increase their opportunities for advancement does not constitute hours of work, and is not compensable, even if the public agency pays the tuition or other costs. See 29 C.F.R. 785.27–785.31; 29 C.F.R. 553.7; J.S. App. 7c.

work schedules in the four-week period.[21] See 29 C.F.R. 553.19; J.S. App. 11c–12c.[22]

3. The foregoing analysis is dispositive of appellants' Tenth Amendment claim. As this Court recog-

[21] With respect to overtime work for firemen, appellants acknowledge that 85% of the cities work their firemen 60 hours a week or less. Paragraph 44 of complaint, Danielson letter of December 24, 1974. Mr. Danielson also acknowledged in his letter that the other 15% of the cities are smaller cities. Thus, substantially more than 85% of the firemen already work 60 hours or less per week. Appellants' unsupported claims of cost should be viewed in the context of 85% of the cities managing to get by on working their firemen sixty hours per week or less.

[22] Appellants also stress the section of the interpretative regulations dealing with sleep and meal time (J.S. 21, n. 5), which represents the one departure from previous interpretations (29 C.F.R. 553.15; J.S. App. 10c). That section interprets Section 7(k), as precluding the deduction of on-duty sleep and meal time from hours worked when the employee is on duty for 24 hours or less, whereas the Department of Labor's prior position, which is applicable to employers generally (29 C.F.R. 785.20, 785.21, and 785.22), precludes the deduction of sleep and meal time only when the employee is on duty for less than 24 hours. In contrast to the regulation under Section 7(k), the general regulations permit exclusion of such time for full 24-hour shifts. In departing from this position on full 24-hour shifts in the case of fire and police agencies claiming the special exemption of Section 7(k), the Department was conforming to the explicit legislative history. The Conference Report states that that section, as amended in conference, "departs from the standard FLSA 'hours of work' concept directed primarily at industrial and agricultural occupations and adopts an overtime standard keyed to the length of the tours of duty, thereby reflecting the uniqueness of the firefighting service" (S. Rep. No. 93–758, 93d Cong., 2d Sess., p. 27). See also, 120 Cong. Rec. S4692 (daily ed., March 28, 1974).

nized in *United States* v. *Darby, supra,* 312 U.S. at 124:

> The amendment states but a truism that all is retained which has not been surrendered. * * * From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. * * *

The only limitation on the "granted power" over commerce is that the federal action must be rationally related to that power. "As long ago as *Sanitary District* v. *United States*, 266 U.S. 405, [this] Court put to rest the contention that state concerns might constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce" (*Maryland* v. *Wirtz, supra,* 392 U.S. at 195–196).[23]

CONCLUSION

Although appellants raise several constitutional questions, those questions have all been authoritatively settled in *Maryland* v. *Wirtz, supra,* and further ple-

[23] Appellants also rely on various decisions involving the federal taxing power and the States' immunity from suits brought by individual citizens (J.S. 30–31; Calif. J.S. 12–13). This Court, however, has repeatedly held that the various tests applied in the taxing cases, as well as under the Eleventh Amendment, are not applicable to the plenary power of Congress to regulate commerce. See *United States* v. *California, supra,* 297 U.S. at 184–185; *Case* v. *Bowles,* 327 U.S. 92, 101; *Employees* v. *Missouri Public Health Department,* 411 U.S. 279; *Edelman* v. *Jordan,* 415 U.S. 651.

nary consideration by this Court is thus unnecessary. The judgment of the district court should be affirmed.

Respectfully submitted.

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Supreme Court of the United States

October Term, 1974

NATIONAL LEAGUE OF CITIES, *et al.*,
Appellants

v.

PETER J. BRENNAN, SECRETARY OF LABOR
Appellee.

STATE OF CALIFORNIA,
Appellant

v.

PETER J. BRENNAN, SECRETARY OF LABOR
Appellee.

On Appeal from the United States District Court for the District of Columbia

MEMORANDUM OF AFL-CIO, et al. (Applicants for Intervention and Amici Curiae) IN SUPPORT OF MOTION TO AFFIRM

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On Appeal from the United States District Court for the District of Columbia

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MEMORANDUM OF AFL-CIO, et al. (Applicants for Intervention and Amici Curiae) IN SUPPORT OF MOTION TO AFFIRM

This memorandum in support of the Government's motion to affirm in the above noted cases is filed by the AFL-CIO, the International Association of Fire Fighters, the American Federation of State, County and Municipal Employees, the Service Employees' International Union, the International Union of Operating Engineers, the American Federation of Teachers and the National Education Association. On January 8, 1975, these organizations jointly filed with this Court a motion to intervene. While no opposition

has been lodged to that motion, it has not yet been acted on. The AFL-CIO, et al., have therefore also secured leave to participate as *amici curiae* in the event the motion to intervene should be denied.

INTEREST OF THE AFL-CIO, ET AL.

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 111 national and international labor unions that have 13,500,000 members, approximately 1,250,000 of whom are employees of state and local governments covered by the 1974 amendments to the Fair Labor Standards Act (hereafter "1974 amendments" and "FLSA"). (Public Law 93-259, 88 Stat. 55, amending 29 U.S.C. §§ 201 *et seq.*). The International Association of Fire Fighters ("IAFF") is a labor organization with 170,000 members, most of whom are employed by state or local governments. The American Federation of State, County and Municipal Employees ("AFSCME") has approximately 700,000 members who are employees of state and local governments. The Service Employees International Union ("SEIU") is a labor organization with 550,000 members approximately 200,000 of whom are employed by state and local governments. The International Union of Operating Engineers ("IUOE") is a labor organization with 350,000 members, 30,000 of whom are employees of state and local governments. The American Federation of Teachers ("AFT") is a labor organization with 325,000 members who are employees of state and local governments; its non-professional members are covered by the 1974 amendments. The National Education Association ("NEA") is an organization representing 1,400,000 professional and non-professional educational

personnel who are employees of state and local governments, the latter being covered by the 1974 amendments.

The AFL-CIO, *et al.*, have determined to participate in this case for two basic reasons. First, and most obviously, they are the freely selected representatives of millions of public employees directly affected by the 1974 Fair Labor Standards Act amendments, the validity of which is at issue here. As such, these organizations supported the 1974 amendments in the vigorous debate that surrounded their consideration and eventual adoption by the Congress. They have concluded that they would be derelict in their duty to their members if they were to abandon the matter now that the appellants have transferred their opposition from the Legislative Branch to this forum.

Second, it is the conviction of the AFL-CIO, *et al.*, that working men and women, whether employed by a private or public employer, and whether they have chosen to be represented in dealing with their employer or not, deserve a living wage for their labor. Yet, in 1973 approximately 409,000 State and local government employees were paid less than $1.90 an hour [1]—at a time when the poverty level income for an urban family of four was $4,540 or approximately $2.27 an hour.[2] That is a national disgrace which fully warranted the national corrective enacted by Congress.

QUESTIONS PRESENTED

Ordinarily, we would not attempt to rephrase the Questions Presented for review by an appellant. With respect

[1] See *Background Materials on the Fair Labor Standards Act Amendments of 1973*, 93d Cong., 1st Sess., p. 220; H. Rept. 93-913, 93d Cong., 2d Sess., p. 28.

[2] S. Rep. 93-690, 93d Cong., 2d Sess., p. 8.

to these appeals, however, it is necessary that we do so in order to clarify which issues are really here. The National League of Cities (hereafter "League") sought in the complaint an order declaring the 1974 amendments to be unconstitutional in their entirety insofar as they are "applied to States, Cities and public subdivisions of States" and for interlocutory, preliminary and permanent injunctions against enforcement of those provisions; its Application for a Stay in this Court is, if possible, even more sweeping. Yet the League appears to have abandoned some of the constitutional objections it raised below.[3] Moreover, the single Question Presented by California is based on the inaccurate factual premise that the 1974 amendments brought "all" public employees under the FLSA (Cal. J.S. 3). We believe the following fairly states the issues which are before the Court in light of appellants' phrasing of the Questions Presented and their Rule 15(1)(f) "statement of reasons why the questions presented are so substantial as to require plenary consideration".

1. Are the Fair Labor Standards Act Amendments of 1974, Public Law 93-259, 88 Stat. 55 unconstitutional in that they:

   a. Raise the minimum wage payable to public employees whose coverage under the Fair Labor Standards Act was sustained as a constitutional exercise of the commerce power in *Maryland* v. *Wirtz*, 392 U.S. 183;

   b. Bring within the minimum wage and maximum hour provisions of the Fair Labor Standards Act certain public employees not previously covered;

   c. Allow suits by public employees against their employers for monies withheld in violation of the Fair Labor Standards Act?

2. Is the decision of the above questions inappropriate in whole or in part, in this action for a declaratory judgment and injunctive relief?

[3] For example, in the court below the League contended that the 1974 Amendments were unconstitutional in that they authorized the Secretary of Labor to bring a suit against states for double damages, attorneys' fees, etc.; and in their Application for a Stay they seek to enjoin suits by the Secretary. However, the League's Sixth Question Presented challenged the constitutionality only of enforcement suits brought by employees (NLC J.S. p. 4). There is also nothing in the League's Jurisdictional Statement (or that of California) which challenges the 1974 amendments insofar as they make the Equal Pay Act (57 Stat. 56, 29 U.S.C. § 2066) and the Age Discrimination in Employment Act of 1967 (81 Stat. 602, 29 U.S.C. § 621 *et seq.*) applicable to the States and their political subdivisions.

ARGUMENT

I. The Present Case Is Controlled In All Its Particulars by *Maryland* v. *Wirtz*, 392 U.S. 183.

In *Maryland* v. *Wirtz*, 392 U.S. 183, 187, this Court sustained the constitutionality of the 1966 amendments to the Fair Labor Standards Act of 1938 (FLSA), which "modified the definition of 'employer' so as to remove the exemption of the States and their political subdivisions with respect to employees of hospitals, institutions, and schools." In considering whether the present appeals raise any issues warranting plenary review by this Court, it is essential to bear in mind both what the Court decided in *Maryland* v. *Wirtz* and what it deliberately chose not to decide. The

Court decided: first, that the FLSA's "enterprise" test for determining coverage is a legitimate exercise of the commerce power (392 U.S. at 188-193); and second, that the application of the FLSA to employees who are engaged in commerce in the constitutional sense is not barred because the employer is a state or a subdivision of a state (*id.* at 193-199). The Court also held that it would be inappropriate to decide two other questions raised by the states: whether, insofar as § 16(b) of the Act appeared to permit suits by employees against states to recover unpaid minimum wages or overtime compensation it violated the Eleventh Amendment (*id.* at 199-200); and whether "in the abstract and in general • • • schools and hospitals have employees engaged in commerce or production" (*id.* at 200-201).[4] We submit that the broad constitutional argument advanced by the appellants herein is identical to and indistinguishable from the constitutional argument rejected in *Maryland* v. *Wirtz*, and that in their details the appellants' objections to the statute are premature for the reasons stated in that case.

a. The 1974 amendments increased the minimum wage payable to all covered employees. Among the beneficiaries of this across-the-board increase were public employees of schools and hospitals who are covered under the 1966 amendments, sustained in *Maryland* v. *Wirtz*. It is uncertain whether the appellants herein are challenging the constitutionality of that increase; see p. 3 n. 3, *supra*. In any event, such a constitutional challenge would be frivolous. The validity of an exercise of the commerce power in establishing minimum wages does not depend on the amount of the legislatively established wage.

b. It is quite incorrect to assert, as does California, that the 1974 amendments expand the reach of the FLSA so as to cover "all" state and local employees (Cal. J.S. pp. 3, 6, 10); and the League's assertion that 11 million employees are affected (NLC J.S. p. 5) is an exaggeration of approximately 100 percent. For, the 1974 amendments retain the earlier exemptions (expressly adverted to in *Maryland* v. *Wirtz*, 392 U.S. at 193) of any "employee employed in a bona fide executive, administrative, or professional capacity." Consequently, whereas the 1966 amendments brought 2.9 million public employees under the FLSA, the 1974 amendments affect an additional 3.4 million. Unless there is some impenetrable constitutional barrier determined by the number of employees covered beyond which Congress may not constitutionally provide minimum wages and maximum hours, it is too plain for argument that *Maryland* v. *Wirtz* cannot be distinguished on the ground that Congress increased the FLSA coverage of public employees working in enterprises "in commerce."

c. While a substantial part of both jurisdictional statements emphasizes the fiscal problems which the 1974 amendments raise for the states and their subdivisions, it is plain that this is not a constitutionally viable basis for distinguishing *Maryland* v. *Wirtz*.

1. It is perhaps sufficient that in *Maryland* v. *Wirtz* itself the states unsuccessfully made like predictions of

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[4] The Court noted:

"Whether particular institutions have employees handling goods in commerce, cf. Walling v. Jacksonville Paper Co., 317 U.S. 564, may be considered as occasion requires." *(Id.)*

fiscal catastrophe if the constitutional validity of the 1966 amendments were sustained.[5]

2. The objection that the 1974 amendments "transfer control of City and State budgets—and with it control of budgets, control of City and State Governments themselves—to federal officials and employees who are neither elected from nor residents of the Cities and States they will control" (NLC J.S. p. 15) presupposes that but for those amendments the cities and states would be autonomous masters of their own fiscal fortunes. That supposition would probably have been a romantic illusion even in 1790. It certainly bears no relation to reality today. The principal determinants of the economic situations of the cities and states are the decisions of how the national economy is to be managed, who is to be taxed by the federal government and how much, and the proportion if any of the resulting federal revenues that are to be granted to the cities and states.[6] As those who replaced the Articles of Confederation with the Constitution intended, these decisions are made by Congress, which is their chosen instrument for exercising "the vast expanse of federal authority over the economic life of the new nation" (*Maryland* v. *Wirtz*, 392 U.S. at 196). Under the scheme of the Constitution, the states' protection against Congressional excesses in the exercise of the commerce power is that the Senators and Representatives

[5] See Brief of Appellants (Maryland et al.) No. 742, Oct. term 1967, pp. 49, 50, 51, 55; Brief for Appellant (State of Texas), *id.*, pp. 18-19.

[6] In 1973 the Federal Government provided over $43.9 billion to the states, and in 1974 it contributed over $46.0 billion. Federal Aid to States for Fiscal Year 1974, p. 1 (Fiscal Service Div. Bureau, Gov't. Operations, Department of the Treasury).

are chosen by the states and the people of the states. James Madison stated:

> "[A]s a security of the rights and powers of the states in their individual capacities ag[ainst] an undue preponderance of the powers granted to the Government over them in their united capacity, the Constitution has relied on 1. The responsibility of the Senators and Representatives in the Legislature of the U.S. to the Legislatures & peoples of the States. 2. The responsibility of the President to the people of the U. States; & 3. The liability of the Ex. and Judiciary functionaries of the U.S. to impeachment by the Representatives of the people of the States, in one branch of the legislature of the U.S. and trial by the Representatives of the States, in the other branch; the State functionaries, Legislative, Executive & judiciary, being at the same time in their appointment & responsibility, altogether independent of the agency or authority of the U. States."[7]

That Congress has met, and not abused, its "responsibility * * * to the legislatures and peoples of the States" in passing the 1974 amendments is manifest since they merely provide state and local employees with the same protections enjoyed by federal (as well as private) employees doing comparable tasks. As the Senate Report stated:

> "The Committee intends that government apply to itself the same standards it applies to private employers. This principle was manifested in 1972 when the Senate overwhelmingly voted to apply Federal equal employment opportunity standards to public sector employers. Equity demands that a worker should not be

[7] 9 Writings of James Madison 383, 395-396 (Hunt ed. 1910), quoted in Wechsler, *The Political Safeguards of Federalism*, 54 Colum. L. Rev. 543, 558-559 (1954).

> asked to work for subminimum wages in order to subsidize his employer, whether that employer is engaged in private business or in government business." (S. Rep. 93-690, 93d Cong., 2d Sess., p. 24.)

3. The League asserts that Congress was misled with respect to the costs which expansion of coverage would impose on the states and cities. As the government demonstrated at its Memorandum in Opposition to a Stay, this statement is inaccurate. The League's argument is improper also because it invites this Court to review Congressional findings, as if they were those of some subordinate tribunal. As was said in *Maryland* v. *Wirtz*, "We are not concerned with the manner in which Congress reached its factual conclusions" (392 U.S. at 190, n. 13).

4. Although appellants rely on *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279, that case actually reinforces the proposition that their fiscal impact arguments are without constitutional merit:

> "Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States." (*Id.* at 284.)

5. As early as *Sanitary District* v. *United States*, 266 U.S. 405, followed in *Maryland* v. *Wirtz*, 392 U.S. at 195, an exercise of the federal commerce power was sustained despite the assertion that it would cost the City of Chicago alone $100,000,000 (see 266 U.S. at 431), and although the Court acknowledged that the case "concerns the expenditures of great sums and the welfare of millions of men" (*id.* at 425). Mr. Justice Holmes said:

> "But cost and importance, while they add to the solemnity of our duty, do not increase the difficulty of decision except as they induce argument upon matters that, with less mighty interests, no one would venture to dispute." *(Id.)*

So here.

d. The major asserted basis for distinguishing *Maryland* v. *Wirtz* is that whereas public schools and hospitals are in competition with private schools and hospitals, other public employees are not in competition with private industry (NLC J.S. 12-14, 22-25, 28, 32; Cal. J.S. 3, 10). This contention misconceives the realities of competition between the private and the public sectors, and, more significantly, misreads *Maryland* v. *Wirtz*.

1. It is patent that many other public services compete with the private sector to at least an equal extent as do public schools and hospitals. A few examples will suffice. Appellants object specifically to the coverage of fire fighters, but many fire fighters are employed by private industry, as the leading FLSA case of *Skidmore* v. *Swift & Co.*, 323 U.S. 134, and its companion, *Armour & Co.* v. *Wantock*, 323 U.S. 126, illustrate. Again, many industries provide their own police protection and guard services, a practice which local governments commonly support by officially deputizing the private guards; see, *e.g.*, *Griffin* v. *Maryland*, 378 U.S. 130. Examples could be multiplied, but they need not be. For, if it were constitutionally necessary to establish that a particular public employee added to the FLSA is or is not in competition with private industry, this would,

under *Maryland* v. *Wirtz*, 392 U.S. at 201, be a matter for case-by-case adjudication. Even on appellants' legal theory, the fact that some employees are in such competition is sufficient to preclude a judgment that the 1974 amendments as a whole are unconstitutional insofar as they expand coverage.

Further, it should not be forgotten that the states and particular subdivisions within states are in a very real sense in constant economic competition with each other. Thus, states and other public bodies advertise to attract new industries, new residents and tourists. Lower taxes and other monetary incentives are commonly offered. Regulation of such competition to assure that it is not waged by paying employees at a poverty level is indistinguishable in constitutional terms from regulation designed to assure that companies in private industry do not secure an advantage by affording their employees substandard conditions.

2. More fundamentally, the existence of competition with private industry was not regarded in *Maryland* v. *Wirtz* as a prerequisite for Congressional regulation under the commerce power of the wages of public employees. Rather, it was merely one of two independent grounds for determining that the FLSA can constitutionally be applied to an entire enterprise rather than to those employees only who are themselves engaged in commerce or in the production of goods for commerce. See 392 U.S. at 188-191. The other, "wholly different line of analysis" which was held to support the enterprise concept is that "substandard labor conditions tended to lead to labor disputes and strikes, and that when such strife disrupted businesses involved in interstate commerce, the flow of goods in commerce was itself

affected" (392 U.S. at 191). Congress expressly recognized that this line of analysis justifies establishing labor standards for public employees. As Senator Javits, a co-sponsor of the Senate bill, stated during the debates:

> "* * * [W]e are very resentful, very unhappy, when workers in the public domain threaten to strike. This is inevitably the result of the deep feelings that economic justice cannot otherwise be obtained, and I respectfully submit that we will go a lot further in getting tranquility in the labor field by giving them a minimum wage status and an overtime status than in almost any other way I can think of, and prevent the feeling on their part that the only way one can get justice is by rule of the jungle, to wit, by strikes and ceasing essential public service." (120 Cong. Rec. S. 2518, Feb. 28, 1974.)

While such a Congressional finding is unnecessary (see *Katzenbach* v. *McClung*, 379 U.S. 294, 304; *Maryland* v. *Wirtz*, 392 U.S. at 190, n. 13), it buttresses the conclusion that there is a rational basis, quite aside from the existence or nonexistence of competition with private industry, for bringing public employees within the FLSA.

The League argues that "[f]ederal officials have * * * admitted that the 1974 Amendments irrationally usurp State and City decision-making, protected by the Tenth Amendment" (NLC J.S. 28-29). Of course, the statements of President Nixon and Secretaries Hodgson and Brennan which it quotes (*id.* at 25-27, 29), opposed expansion of coverage not on constitutional grounds, but as a matter of policy.

c. Appellants are especially critical of Congress' decision to provide the protections of the Fair Labor Standards

Act to fire fighters and employees engaged in law enforcement. In fact, Congress expressly dealt with and went far to accommodate the concerns of local governments in this respect, by virtue of § 6(c)(1)(A) of the 1974 Act, which provides special means for computing overtime performed by these employees.[8] That appellants' objections to the standards which Congress did impose are without constitutional significance is established by what was said in *Maryland* v. *Wirtz* in disposing of an almost identical argument.[9]

f. The League raises the question whether the Eleventh Amendment forbids suits to recover unpaid compensation required by the FLSA. In *Maryland* v. *Wirtz*, this identical issue was held to be inappropriate for adjudication in a declaratory judgment action. 392 U.S. at 200.

g. The pervasive deficiency in the jurisdictional statements is that they advance no principled distinction, no rational line of demarcation, between the holding that em-

[8] See H. Conf. Rep. No. 93-953, 93d Cong., 2d Sess., pp. 26-27.

[9] Mr. Justice Harlan wrote:

> "In the court below, Judge Thomsen was troubled by the application of the overtime provisions to school and hospital personnel, who may have different arrangements for hours of work than employees of other enterprises. 269 F. Supp. at 851 Congress indicated its attention to this problem in 29 U.S.C. § 207 (1964 ed., Supp. II), which provides special means of computing hospital overtime. That this provision may seem to some inadequate, and that no similar provision was made in the case of schools, are matters outside judicial cognizance. The Act's overtime provisions apply to a wide range of enterprises, with differing patterns of work-time; they were intended to change some of those patterns. It is not for the courts to decide that such changes as may be required are beneficial in the case of some industries and harmful in others." (392 U.S. at 194, n. 22.)

ployees of public schools and hospitals may constitutionally be covered by the FLSA and the question whether the public employees affected by the 1974 Amendments may constitutionally be covered. Instead, appellants are driven to repeating the same arguments and slogans which were unpersuasive in *Maryland* v. *Wirtz*. It could not be otherwise: The proposition that the only public employees who are engaged in commerce are those in schools and hospitals could not be seriously maintained, and the question whether particular classes of employees are properly covered is a matter for case-by-case adjudication. See 392 U.S. at 201. As to those employees who *are* in commerce, appellants cannot escape from the basic proposition, reaffirmed in *Maryland* v. *Wirtz* (*id.* at 196-197):

> "But while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation."

Plenary review is not necessary to tell appellants once again that this Court will not "carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States for the benefit of their citizens" (392 U.S. at 198).

II. *Maryland* v. *Wirtz* Should Be Followed.

As we have shown, appellants' challenge to the 1974 amendments as they affect public employees differs in no constitutionally substantial particular from the attack

against the 1966 amendments which was rejected in *Maryland* v. *Wirtz*. Thus, appellants cannot prevail if *Maryland* v. *Wirtz* remains the law. Neither appellant raises as a Question Presented for review whether *Maryland* v. *Wirtz* should be overruled; and, even if that question were candidly and squarely raised, it would not justify review of the judgment below.

a. The most persuasive evidence for the preservation of *Maryland* v. *Wirtz* as a precedent is the reasoning of Mr. Justice Harlan's opinion for the Court. It would unduly lengthen this memorandum were we to set forth even the major part of his lucid analysis. But in light of the dissent in that case, which was based on *New York* v. *United States*, 326 U.S. 572, which acknowledged limitations on the power of the federal government to tax state governments, it may be appropriate to recall that he quoted with approval from the unanimous decision in *United States* v. *California*, 297 U.S. 175, 185, the following language:

> "[W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual."

b. The League suggests (NLC J.S. pp. 23-24) that the *Maryland* v. *Wirtz* precedent has been undermined by "admissions" made by Justice Department attorneys in the presently pending case of *Fry* v. *United States*, No. 73-822. Insofar as that argument is based on the government's brief in *Fry*, it is an exercise in wishful reading. Far from abandoning *Maryland* v. *Wirtz*, that brief relies on that case as a controlling precedent,[10] and immediately after the sentence on which the League seizes, quotes from "the landmark decision of *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, [where] the Court stated that the commerce power 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution.' "[11]

However, the League is correct in stating that there was a departure from this position in the oral argument of government counsel in *Fry*. The following colloquy occurred (Tr. 30):

> Q. The rub comes from the fact that it may be that Congress can't exert the commerce power to the same extent against states as it can against private employers.
>
> Mrs. Lafontant: Well, there's no doubt about it, yes, because of the Tenth Amendment.

With all respect, it is clear that counsel erred.[12]

As Chief Justice Warren explained for a unanimous Court in *Sperry* v. *Florida Bar*, 373 U.S. 379, 403:

> "Congress having acted within the scope of the powers 'delegated to the United States by the Constitution,' [there the power to grant patent rights] it has not exceeded the limits of the Tenth Amendment despite the

[10] Brief of the United States, No. 73-822, pp. 16-17.

[11] *Id.* at 18.

[12] "This court is loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning from the Court during oral argument." *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 170.

> concurrent effects of its legislation upon a matter otherwise within the control of the State. 'Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States.' II Annals of Congress 1897 (remarks of Madison). The Tenth Amendment 'states but a truism that all is retained which has not been surrendered.' United States v. Darby, 312 U.S. 100, 124; Case v. Bowles, 327 U.S. 92, 102. Compare Leslie Miller, Inc. v. Arkansas, 352 U.S. 187."

c. *Maryland v. Wirtz* did not declare new law. Rather, as the Court's opinion painstakingly developed, it applied to the FLSA a constitutional principle first declared in a unanimous decision by Mr. Justice Holmes,[13] and thereafter followed without deviation in case upon case. No argument of principle, indeed no slogan such as "state sovereignty," "government itself", "essential services", etc. which was advanced by the appellants in *Wirtz* had not been previously offered and rejected.

One of the present appellants, the State of California, has protested against the exercise of the commerce power to regulate its operations three times *as a party*,[14] yet neither that State nor the other appellants presented a single new thought on the constitutional issue. Accordingly, to grant yet another encore "would overtax an already burdened system of justice" (NLC J.S. p. 16).

---

[13] *Sanitary District v. United States*, 266 U.S. 405.

[14] *United States v. California*, 297 U.S. 175; *California v. United States*, 320 U.S. 577; *California v. Taylor*, 353 U.S. 553.

CONCLUSION

For the foregoing reasons the Government's motion to affirm should be granted.

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Nos. 74-878 and 74-879

In the Supreme Court of the United States

OCTOBER TERM, 1974

THE NATIONAL LEAGUE OF CITIES, ET AL., APPELLANTS

v.

JOHN T. DUNLOP, SECRETARY OF LABOR

THE STATE OF CALIFORNIA, APPELLANT

v.

JOHN T. DUNLOP, SECRETARY OF LABOR

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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Hans v. *Louisiana*, 134 U.S. 1	62
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Shultz v. *Deane-Hill Country Club, Inc.*, 310 F. Supp. 272, affirmed *per curiam*, 433 F. 2d 1311, certiorari denied, 400 U.S. 820	68
Shultz v. *Union Trust Bank of St. Petersburg*, 297 F. Supp. 1274	71
South Carolina v. *Katzenbach*, 383 U.S. 301	60
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Thomas v. *Collins*, 323 U.S. 516	60
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United States v. *California*, 297 U.S. 175	32, 33, 35, 55, 58, 62-63
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29 U.S.C. (1940 ed.) 203(d) — 4
29 U.S.C. (1940 ed.) 206(a) — 4
29 U.S.C. (1940 ed.) 207(a) — 4
29 U.S.C. (1940 ed.) 207(b) — 4
29 U.S.C. (1940 ed.) 211(c) — 4
29 U.S.C. (1940 ed.) 212 — 4

Fair Labor Standards Amendments of 1966, 80 Stat. 830 — 2, 8, 10, 12, 16, 18, 33, 42, 43, 44, 59, 67, 70

Fair Labor Standards Amendments of 1974, P.L. 93-259, 88 Stat. 55, *et seq.*: — *passim*

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29 U.S.C. 630(f) — 7

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42 U.S.C. 501, *et seq.* — 25
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29 C.F.R. 5162 — 47

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I Annals of Congress (1789) — 54
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Burton & Krider, *The Incidence of Strikes in Public Employment*, Conference on Labor in Nonprofit Industry and Government, Princeton University (May 1973) — 17
Background Material on the Fair Labor Standards Act Amendments of 1973, 93d Cong., 1st Sess. — 8, 16, 44
107 Cong. Rec. 5841 — 70
107 Cong. Rec. 5964-5965 — 68
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107 Cong. Rec. 6088-6089 — 68
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119 Cong. Rec. S14056 (daily ed., July 19, 1973)	23
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120 Cong. Rec. H2297 (daily ed., March 28, 1974)	50
120 Cong. Rec. H2301-H2302 (daily ed., March 28, 1974)	15
120 Cong. Rec. S2518 (daily ed., February 28, 1974)	17
120 Cong. Rec. S4692 (daily ed., March 28, 1974)	52
II Elliot's Debates (2d ed., 1787)	54
III Elliot's Debates (2d ed., 1787)	54
IV Elliot's Debates (2d ed., 1787)	54
Executive Office of the President, Office of Management and Budget, *Special Analyses, Budget of the United States Government* p. 203 (Washington, D.C., 1974)	15, 45
39 Fed. Reg. 17596	51
39 Fed. Reg. 44142	9
Frankfurter, *The Commerce Clause under Marshall, Taney and Waite* (1937)	54
Hearings before the General Subcommittee on Labor of the House Committee on Education and Labor, on Labor: To Amend the Fair Labor Standards Act, H.R. 10498 and H.R. 17596, 91st Cong., 2d Sess.	17
Hearings before the General Subcommittee on Labor of the House Committee on Education and Labor, on H.R. 4757 and 2831, 93d Cong., 1st Sess.	48, 49
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H. Rep. No. 89-1366, 89th Cong., 2d Sess.	19
H. Rep. No. 93-913, 93d Cong., 2d Sess.	16, 45
H.R. 2166, 94th Cong., 1st Sess.	27
Survey of Current Business, "Input-Output Structure of the U.S. Economy, 1963", U.S. Department of Commerce, Office of Business Economics, Vol. 49, No. 11 (November 1969)	14
International City Management Association, Urban Data Service, Report 9/74	49
News, U.S. Department of Labor, Bureau of Labor Statistics, USDL 75-136, March 7, 1975	26
Nonsupervisory Employees in State and Local Governments, U.S. Department of Labor, Workplace Standards Administration, 1971 Report to Congress	20-21, 45
Report on State-Local Taxation and Industrial Location, April 1967, Advisory	

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Commission on Intergovernmental Relations	21
S. Rep. No. 145, 87th Cong., 1st Sess.	68, 70, 71
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S. Rep. No. 93-690, 93d Cong., 2d Sess.	5, 15, 16, 23-24, 25, 26, 27, 69, 72
S. Rep. No. 93-758, 93d Cong., 2d Sess.	52
State Government Finances in 1973, U.S. Department of Commerce, Bureau of the Census (1974)	20
Story, II *Commentaries on the Constitution* (2d ed., 1851)	54
Unemployment Insurance Statistics, U.S. Department of Labor, January 1975	26
U.S. Department of Agriculture, 1975 Budget, Explanatory Notes, Vol. 3	26
U.S. Department of Commerce, Bureau of Census, *Public Employment in 1973*	6, 20
U.S. Department of Health, Education and Welfare, Office of Financial Management, Social and Rehabilitation Service Report No. 75-04011 (1974)	26
University of California Institute of Government Studies, *Strikes by Public Employees and Professional Personnel: A Bibliography* (June 1967)	17
Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Columbia L. Rev. 543 (1954)	41
White, "Work Stoppages of Government Employees," *Monthly Labor Review* (December 1969)	17

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-878

THE NATIONAL LEAGUE OF CITIES, ET AL., APPELLANTS

v.

JOHN T. DUNLOP, SECRETARY OF LABOR

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THE STATE OF CALIFORNIA, APPELLANT

v.

JOHN T. DUNLOP, SECRETARY OF LABOR

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the three-judge district court (J.S. App. A; II App., p. 643) is not reported.

JURISDICTION

This action seeks to enjoin, as unconstitutional, enforcement of the 1974 amendments to the Fair Labor Standards Act of 1938 (P.L. 93-259, 88 Stat. 55, amending 29 U.S.C. 201 *et seq.*), insofar as those amendments apply to State and local governments. A three-judge district court was convened pursuant to 28 U.S.C. 2284, and on December 31, 1974 the court entered a judgment granting appellee's motion to dismiss. The notice of appeal of appellants National League of Cities, *et al.*,[1] was filed on December 31, 1974, and the notice of appeal of the State of California was filed on January 8, 1975. Probable jurisdiction was noted on January 27, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTION PRESENTED

In *Maryland* v. *Wirtz*, 392 U.S. 183, this Court sustained, against constitutional challenges, the 1966 amendments to the Fair Labor Standards Act of 1938 (Act), 80 Stat. 830, which extended the Act's basic wage and hour standards to 2.9 million public school, hospital and transit employees. The 1974 amendments to the Act, 88 Stat. 55, extend those standards to an additional 3.4 million employees of the States and their political subdivisions.

[1] Appellant National League of Cities is hereinafter referred to as "National League" or "N.L." and its brief is referred to as "N.L. Br." The brief of appellant California is referred to as "Cal. Br." "I App." and "II App." refer to the parties' joint appendix in this Court.

The question is whether the 1974 amendments exceeded Congress' power under the Commerce Clause.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitution of the United States provides in pertinent part:

Article I, Section 8:

> The Congress shall have Power * * *
>
> * * * *
>
> To regulate Commerce * * * among the several States * * *
>
> * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article VI:

> * * * *
>
> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Eleventh Amendment:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fair Labor Standards Amendments of 1974 are set forth in the appendix to the brief of each appellant.

STATEMENT

The Fair Labor Standards Act, as originally enacted in 1938, required employers covered by the Act to pay those of their employees who were engaged in commerce or in the production of goods for commerce a minimum wage, as well as one and one-half times their regular rate of pay for hours worked in excess of 40 a week; to keep records necessary or appropriate for the enforcement of the Act; and to comply with certain child labor standards (29 U.S.C. (1940 ed.), 206(a), 207(a) and (b), 211(c), 212). The States and their political subdivisions were specifically excluded from the Act's coverage (29 U.S.C. (1940 ed.) 203(d)).

In 1961, Congress extended the coverage of the Act beyond employees themselves engaged in commerce or in the production of goods for commerce, to all employees of certain "enterprises" which had some employees so engaged (29 U.S.C. (1964 ed.) 203(r), 203(s), 206(b), 207(a)(2)). The States and their political subdivisions remained among the

employers specifically excluded from the Act's coverage (29 U.S.C. (1964 ed.) 203(d)).

In 1966, Congress extended the Act's coverage (including the prohibition against sex-based wage differentials added by the Equal Pay Act of 1963) to 2.9 million employees of State and other public enterprises engaged in operating transit companies, hospitals, schools, and related institutions (29 U.S.C. (1970 ed.) 203(d), 203(r)(1) and (2), 203(s)(1) and (4), 206 (d)). Except to this extent, "any State or political subdivision of a State" was excluded from the Act's definition of an "Employer" (29 U.S.C. (1970 ed.) 203(d)). The constitutionality of this extension of the Act's provisions to the States and their political subdivisions was upheld in *Maryland* v. *Wirtz*, 392 U.S. 183.

In 1974, Congress amended the Act [2] to cover an additional 3.4 million employees of the States and their political subdivisions.[3] This extension of cover-

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[2] The 1974 amendments became effective on May 1, 1974. The overtime provisions for employees engaged in fire protection and law enforcement activities did not, however, become effective until January 1, 1975.

[3] S. Rep. No. 93-690, 93d Cong., 2d Sess., p. 16. Appellants use the figure 11.4 million, which was the total employment for State and local governments in 1973 (N.L. Br., p. 10). As they concede, however, the minimum wage and overtime provisions apply only to nonexempt employees. The equal pay provisions are also inapplicable to certain employees (*i.e.*, those subject to any of the exemptions set forth in 29 U.S.C. (Supp. III) 213(a), other than 29 U.S.C. 213(a)(1)). The 11.4 million figure also includes employees already covered

age was accomplished by removing the exclusionary language from the Act's definition of "Employer" and by adding to it the phrase "public agency" (29 U.S.C. 203(d); N.L. Br. App., p. 4a). "Public agency" was defined to include "the government of a State or political subdivision thereof" (29 U.S.C. 203(x); N.L. Br. App., p. 5a). The definition of an "Enterprise engaged in commerce or in the production of goods for commerce" was amended to include "an activity of a public agency" (29 U.S.C. 203(s); N.L. Br. App., p. 5a). That amendment continues (*ibid.*):

> The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

In addition to the Act's general exemption from coverage of "executive, administrative, or professional" personnel (29 U.S.C. 213(a)(1)), the 1974 amendments specifically exclude from coverage any individual who "holds a public elective office" or is appointed by such an officeholder to be a "member of his personal staff" or "to serve on a policymaking

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under the prior law held constitutional in *Maryland* v. *Wirtz*, *supra*. Thus, of the 11.4 million employees, 6.9 million are employed by schools, hospitals and transit companies and therefore are covered (except 4.0 million who are exempt) without regard to the 1974 amendments. See U.S. Department of Commerce, Bureau of Census, *Public Employment in 1973*, p. 9.

level," or is an immediate advisor to such officeholder "with respect to the constitutional or legal powers of his office" (29 U.S.C. 203(e)(2)(C); N.L. Br. App., p. 4a).[4]

The Act's minimum wage and overtime requirements applicable to appellants, which are generally lower than those the Act provides for private employers, are self-executing and do not depend upon the issuance of any rules or regulations (29 U.S.C. 206(b), 207(k), 213(b)(20); N.L. Br. App., pp. 1a, 5a, 6a). The Secretary is not authorized to add any additional requirements not already applicable to private employers.[5]

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[4] The 1974 amendments also extended the provisions of the Age Discrimination in Employment Act of 1967 to all State and local government employees, except those who are elected or appointed by elected officials to their personal staffs or to policy making positions. 29 U.S.C. 630(b), (c), (f); N.L. Br. App., p. 19a.

[5] The 691 pages of Regulations referred to by appellants (N.L. Br., pp. 25, 117) are a codification of all Federal Register documents issued on the Fair Labor Standards and Age Discrimination in Employment Acts (29 C.F.R. Parts 500 to 860). Only a small part of those documents, as appellants themselves concede (N.L. Br., pp. 25, 117-118), even remotely concerns the States and local governments. Moreover, with the exception of the Department of Labor's regulations on recordkeeping and hazardous child labor, its rulings and interpretations do not impose additional requirements on employers, as the court below mistakenly assumed. Instead, they implement (in the case of the exemption for executive, administrative and professional employees) or explain (in the case of the Act's overtime exemptions, including the partial exemption provided by Section 7(k) (29 U.S.C. 207(k); N.L. Br. App., p. 5a) for fire protection and law enforcement person-

On December 12, 1974, appellants National League of Cities, *et al.* brought this suit in the United States District Court for the District of Columbia to enjoin the enforcement of the 1974 Amendments insofar as they apply to States and local governments.[6] A three-judge district court was convened and, after hearing oral argument on appellants' motion for preliminary relief and appellee's motion to dismiss,[7] granted appellee's motion on December 31, 1974, on the ground that this case "is controlled by the decision of the Supreme Court in *Maryland* v. *Wirtz*, 392 U.S. 183" (II App., p. 649).[8]

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nel) sections of the Act which, if invoked, would relieve employers from certain of the Act's requirements.

[6] Appellants seek not only to enjoin the application of the Act to employees not previously covered, but also to enjoin application of the new minimum wage rates for employees who were first covered by the 1966 Amendments upheld in *Maryland* v. *Wirtz, supra.* The coverage of the new minimum wage rates ($1.90 until January 1, 1975, and $2.00 during the next phase) is shown in a 1973 report prepared for Congress which estimated that 314,000 of the 2.9 million public employees covered by the 1966 amendments were paid less than $1.80 in September 1973 (Background Material on the Fair Labor Standards Act Amendments of 1973, 93d Cong., 1st Sess., p. 220).

[7] The court held no evidentiary hearing and made no factual findings. Its comments on what it erroneously assumed to be regulations and on dollar impact, as well as on the nature of the activities covered by the 1974 amendments (II App., pp. 650-651), are simply a repetition of appellants' allegations and are not findings based on evidence.

[8] On the same day, the Chief Justice granted a stay of "those parts of the 1974 Amendments * * * which go into effect January 1, 1975" and of the "Regulations promulgated

ARGUMENT

Introduction and Summary

The issues raised by appellants were all resolved by this Court only seven years ago, with respect to the same statute, in *Maryland* v. *Wirtz*, 392 U.S. 183. There are no significant differences between this case and *Maryland*; and *Maryland* itself is soundly based on an unbroken line of Commerce Clause decisions.

The Fair Labor Standards Act was first enacted in 1938 as a result of congressional findings, set forth in Section 2(a) of the Act, 52 Stat. 1060, 29 U.S.C. 202(a), that:

> the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

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by the Secretary of Labor, 29 C.F.R. Part 553—Employees of Public Agencies Engaged in Fire Protection or Law Enforcement Activities * * *" 39 Fed. Reg. 44142 (December 20, 1974), effective January 1, 1975 (Oct. Term, No. A-553). The stay was continued by order of the Court entered January 13, 1975.

1. The original Act was upheld as a valid regulation of commerce in *United States* v. *Darby*, 312 U.S. 100. When the Act's coverage was extended in 1966 to 2.9 million employees in schools and hospitals operated by States and local governments (*supra*, p. 5), the extension was likewise sustained under the commerce power. *Maryland* v. *Wirtz*, *supra*. The Court noted the millions of dollars of interstate purchases made by these agencies (392 U.S. at 194) and added that "[s]trikes and work stoppages involving employees of schools and hospitals * * * obviously interrupt and burden this flow of goods across state lines" (392 U.S. at 195; footnote omitted). The Court concluded "that a 'rational basis' exists for congressional action prescribing minimum labor standards for schools and hospitals * * *" (392 U.S. at 195), notwithstanding the fact that "a State is involved" (392 U.S. at 197).

It is not seriously disputed that the same "rational basis" exists for the Congressional action here challenged. Rather, appellants seek to distinguish *Maryland* on the ground that the public agencies covered by the 1974 Amendments—unlike those covered by the 1966 Amendments—are not in competition with the private sector (N.L. Br., p. 126; Cal. Br., p. 45). But the decision in *Maryland* that the Act could be extended to public agencies was not based on a conclusion that those agencies competed with private enterprises. In any event many of the newly covered public agencies in fact compete with the private sector. Moreover States and local bodies compete among

themselves for the location of industry by lower taxes, subsidies and other incentives. Like a low-wage private employer, a public agency that pays a substandard wage has an unfair advantage in this competition. Finally, as large scale employers, public agencies are implicated in all of the other Congressional policies underlying the 1974 Amendments, including the stimulation of the economy by additional consumer spending, the creation of new jobs by spreading employment and the reform of the welfare system.

2. State and local governmental activities having a substantial effect upon commerce have no immunity from Congress' exercise of the commerce power. "[I]t is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary'" (*Maryland*, *supra*, 392 U.S. at 195). This conclusion in *Maryland* follows established constitutional doctrine.

The concerns expressed by the dissenters in *Maryland* do not justify invalidating the 1974 Amendments. The dissent recognized that much federal regulation may legitimately be applied to the States, so long as it does not threaten to destroy the sovereignty of the States guaranteed by the Constitution. The 1974 Amendments do not threaten State sovereignty. They do not displace State policy, they only require that, in pursuit of that policy (which remains solely within the States' discretion), the State must satisfy very minimum standards as to wages and hours.

The alleged financial burdens of complying with the 1974 Amendments are vastly overstated, proceed from misunderstandings of the actual operation of the Amendments, and, in any event, are concededly not a factor in the constitutional validity of the 1974 Amendments.

The Tenth Amendment does not affect the validity of action taken within the commerce power. That Amendment reserves to the States and people the powers not otherwise delegated to the United States. It "does not operate as a limitation upon the powers * * * delegated to the national government." *Case* v. *Bowles*, 327 U.S. 92, 102.

The Eleventh Amendment is invoked prematurely and is, in any event, not applicable to suits brought by the Secretary of Labor or in State courts.

Appellants' statutory arguments are also premature and, in any event, groundless.

I

THE ACTIVITIES OF STATE AND LOCAL GOVERNMENTS COVERED BY THE 1974 AMENDMENTS HAVE A SUFFICIENT EFFECT ON INTERSTATE COMMERCE TO BE A PROPER SUBJECT OF LEGISLATION BY CONGRESS UNDER THE COMMERCE POWER.

In *Maryland* v. *Wirtz* this Court upheld the 1966 extension of the Fair Labor Standards Act to State and local public school and hospital workers. All of the considerations held sufficient in *Maryland* to support the application of the Act to public schools and

hospitals are equally applicable to the State and local government functions covered by the 1974 Amendments.

A. Substandard labor conditions in the covered activities may lead to labor disputes burdening the flow of goods in interstate commerce.

In *Maryland* the Court held that Congress had the power under the Commerce Clause to extend the coverage of the Act to public schools and hospitals because "[i]t is clear that labor conditions in schools and hospitals can affect commerce" (392 U.S. at 194). The Court's conclusion rested on two well-founded premises: first, that "such institutions are major users of goods imported from other States" (*ibid.*) and, second, that "[s]trikes and work stoppages involving employees of schools and hospitals * * * obviously interrupt and burden this flow of goods across state lines" (392 U.S. at 195). The necessary conclusion which the Court drew was that "a 'rational basis' exists for congressional action prescribing minimum labor standards for schools and hospitals * * *" (*ibid.*).

Similarly, here the affected State and local activities "are major users of goods imported from other States" and labor disputes involving those activities "obviously interrupt and burden this flow of goods across state lines."

It is no less true of public establishments generally than of public schools and hospitals that, in the words of *Maryland* v. *Wirtz*, "[they], as a whole, obviously purchase a vast range of out-of-state commodities

[that] are put to a wide variety of uses, presumably ranging from physical incorporation * * * into * * * structures [*e.g.*, police and fire facilities and libraries] to over-the-counter sale for cash * * * [*e.g.*, alcoholic beverage monopolies and vehicle registration services]." See 392 U.S. at 201.

In 1971 the purchases of goods and services by State and local governments amounted to 135 billion dollars, constituting 12 percent of our gross national product for that year (119 Cong. Rec. S14057 (daily ed., July 19, 1973)).[9] The expenditures have a significant effect on every sector of the economy. The data available for 1963[10] show that in that year State and local government purchases accounted for 23.4 percent of the national output of the new construction industry and 14.6 percent of that of the office supplies industry. Other areas of substantial purchases by States and local governments in that year were: stone and clay products, 18.4 percent; lumber and wood products, other than containers, 14.9 percent; non-household furniture and fixtures, 13.6 percent; printing and publishing, 8.4 percent; heating, plumbing, and structural metal products, 18.2 percent; radio and television broadcasting, 8.0 percent.[11]

[9] Of this figure, 57 percent was for compensation of their own employees, creating over 9 million jobs (see *infra*, p. 22). The remaining 43 percent reflected over 5 percent of the entire gross national product.

[10] "Input-Output Structure of the U.S. Economy, 1963," *Survey of Current Business*, U.S. Department of Commerce, Office of Business Economics, Vol. 49, No. 11 (November 1969), p. 21, Table A.

[11] *Ibid.*

These figures do not, of course, reflect the impact of revenue sharing on expenditures by State and local governments.[12]

The Senate Report on the 1974 Amendments (S. Rep. No. 93-690, 93d Cong., 2d Sess., p. 24) noted the purchasing by State and local governments: "Governments purchase goods and services on the open market, they collect taxes and spend money for a variety of purposes. * * *" Thus the district court correctly stated that "the state and municipal institutions whose employees are reached for the first time by the 1974 Amendments do make substantial purchases in interstate commerce of equipment and other goods" (II App., p. 649).

Equally well supported in this case is the second premise of the *Maryland* decision: Labor disputes involving public agencies affect the flow of commerce. Congress' finding in 1938 that substandard labor con-

[12] Thus, "[i]n 1975, Federal aid to State and local governments is expected to total $52.0 billion * * *." Executive Office of the President, Office of Management and Budget, *Special Analyses, Budget of the United States Government*, p. 203 (Washington, D.C. 1974). "In total, Federal aid will finance about 22% of State and local expenditures in 1975" (*id.* at 205). This substantial flow of Federal funds will correspondingly increase the involvement of State and local government agencies in the flow of interstate goods and supplies. In the congressional debate on the Amendments, the availability of federal assistance was viewed both as a reason for extending the coverage of the Act (118 Cong. Rec. 24748-24750), and as a means of alleviating any adverse financial impact the extended coverage might have (120 Cong. Rec. H2301-H2302 (daily ed., March 28, 1974)).

ditions "lead to labor disputes burdening and obstructing commerce and the free flow of goods in commerce" (29 U.S.C. 202(a)(4)) is equally applicable to the public agencies covered by the 1974 Amendments.

In considering the 1974 Amendments, Congress had before it evidence of the existence of substandard labor conditions in State and local governments. An estimated 409,000 State and local government employees were paid less than $1.90 an hour in 1973 [13]—at a time when the poverty level income for a nonfarm family of four was $4,540 or approximately $2.27 an hour.[14] Ten percent of the nonsupervisory State and local government employees (including 20 percent of the police and fire employees) worked more than 40 hours a week.[15]

Moreover, it is true of public power systems, airport facilities, and even libraries, no less than public schools or hospitals, that "labor conditions * * * can affect commerce" by causing strikes and work stoppages which "interrupt and burden [the] flow of goods across state lines" (392 U.S. at 194-195). Dur-

[13] The 409,000 figure is reached by adding to the 314,000 employees covered by the 1966 Amendments, earning less than $1.80 an hour in September 1973, the 95,000 employees that Congress proposed to cover additionally when the minimum was raised to $1.90 an hour. See, Background Material on the Fair Labor Standards Act Amendments of 1973, 93d Cong., 1st Sess., p. 220; H.Rep. No. 93-913, 93d Cong., 2d Sess., p. 28.

[14] S.Rep. No. 93-690, 93d Cong., 2d Sess., *supra*, at p. 8.

[15] H.Rep. No. 93-913, 93d Cong., 2d Sess., *supra*, at p. 29.

ing the hearings on the Amendments, there was testimony concerning the growing frequency of labor disputes and strikes among public employees.[16] In 1970, excluding educational institutions and State agencies, there were 197 work stoppages by local government employees, resulting in a loss of 289,300 man-days of work. Burton and Krider, *The Incidence of Strikes in Public Employment*, Conference on Labor in Nonprofit Industry and Government, Princeton University (May 1973), Table 3, p. 6. There were 409 work stoppages among all categories of State and local government employees, resulting in a loss of 1,375,100 man-days of work (*id.* at Table 2, p. 4). See also White, "Work Stoppages of Government Employees," *Monthly Labor Review* (December 1969), pp. 29-34; University of California Institute of Governmental Studies, *Strikes by Public Employees and Professional Personnel: A Bibliography* (June 1967).

Appellants have not suggested any reason for assuming that the effect of such strikes and stoppages on the flow of commerce would be less in the newly covered establishments than in those considered in *Maryland* v. *Wirtz*. To the contrary, it would seem that the effect on commerce would be greater if a

[16] Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on S. 1861 and S. 2295, 92d Cong., 1st Sess., p. 366; Hearings before the General Subcommittee on Labor of the House Committee on Education and Labor, on H.R. 10498 and H.R. 17596, 91st Cong., 2d Sess., pp. 53, 59; 120 Cong. Rec. S2518 (daily ed., February 28, 1974) (Statement by Senator Javits).

municipal airport or a publicly owned utility system was forced by labor trouble to close, than if a school or hospital was similarly shut down.

In sum, as the district court concluded (II App., p. 649):

> Since it is uncontested that the state and municipal institutions whose employees are reached for the first time by the 1974 Amendments do make substantial purchases in interstate commerce of equipment and other goods, the decision in *Wirtz* disposes of this case.

B. Competition between public and private agencies was not the basis of *Maryland* v. *Wirtz*; in any event, many of the newly covered public activities and employees compete with private enterprises.

In *Maryland* v. *Wirtz* the Court noted (392 U.S. at 194, 197) that private persons, as well as governments, operate schools and hospitals. Appellants seek to distinguish *Maryland* on the basis of these observations, arguing that—unlike schools and hospitals—the activities covered by the 1974 Amendments are "noncompetitive" (Cal. Br., p. 47; see N.L. Br., pp. 18 and 126).[17]

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[17] National League (N.L. Br., p. 18) suggests that the Congressional rationale for the 1966 Amendments was solely the fact that the newly covered enterprises were in substantial competition with private business enterprises. But, as this Court pointed out in *Maryland*, *supra*, 392 U.S. at 191 and n. 14, the finding in Section 2 of the Act, 29 U.S.C. 202, "that the existence of substandard labor conditions 'leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce'," led Congress to "promote labor peace by regulation of subject matter, wages, and hours,

The Court's finding of a rational basis for the congressional action in *Maryland*, however, was not based on a finding of competition between public and private employers. The finding of an effect upon commerce rested on the substantial importation of goods by the covered enterprises and the effect of their labor

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out of which disputes frequently arise." "This objective," the Court added, "is particularly relevant where, as here, the enterprises in question are significant importers of goods from other states"—which is, of course, equally true in the instant case. Moreover, the Committee report quoted by National League (N.L. Br., p. 18) continues:

> Even outweighing the consideration of unfair competition between covered and noncovered enterprises were the needs of the employees of these enterprises. A custodial worker in an educational institution is as much in need of a minimum standard of living as a custodial worker in an aircraft plant. * * * Such institutions are compelled to purchase goods and contract services from employers who must pay the minimum wage. They cannot, in good conscience, deny their own employees this bare minimum. They continue to expand and construct new facilities at the prevailing market costs. They can pay their own employees wages necessary for the maintenance of the minimum standard of living [H. Rep. No. 89-1366, 89th Cong., 2d Sess., p. 17].

In addition, as the Senate report cited by National League points out, Congress was concerned by the fact that State and local employers require many of their employees to work long overtime hours, thus denying employment to others and aggravating the nation's unemployment problem:

> Approximately 5 million employees will be protected by the overtime provisions of the act for the first time. The committee believes that new jobs will become available as the excessive hours worked by present employees are reduced [S. Rep. No. 89-1487, 89th Cong., 2d Sess., p. 22].

disputes upon the flow of such goods (see 392 U.S. at 194-195).

To the extent that the potential for competition between public and private schools and hospitals may have influenced the decision in *Maryland* v. *Wirtz*, a like potential exists for a large number of the activities covered by the 1974 Amendments. State and local governments operate gas and electric authorities,[18] trash collection agencies, water and transport terminals (which in 1973 aggregated approximately $105 million in gross revenues),[19] airports ($73 million in 1973),[20] recreation facilities, libraries, and the like—all of which, in the absence of the 1974 Amendments, would have a competitive advantage.[21] U.S. Department of Commerce, Bureau of Census, *Public Employment in 1973*, p. 9. The newly covered public employees are, moreover, employed in the same kinds of occupations as covered employees in the private sector: *e.g.*, custodial workers, dock sweepers, laborers, groundkeepers, laundry workers, cooks, food service workers, elevator operators, bridge tenders, library aides, home service aides, community work-

[18] Even when these authorities operate under exclusive franchises, they compete with private suppliers of oil, coal, and other sources of energy.

[19] *State Government Finances in 1973*, U.S. Dept. of Commerce, Bureau of the Census, Table 7, pp. 24-25 (1974).

[20] *State Government Finances in 1973, supra*, at pp. 24-25.

[21] See, *e.g.*, *Schultz* v. *Instant Handling, Inc.*, 418 F.2d 1019 (C.A. 5) (trash removal company); *General Electric Co.* v. *Porter*, 208 F.2d 805 (C.A. 9) (fire protection company). Some municipalities likewise contract with private companies to perform their fire protection services.

ers, farm and dairy hands, messengers, building guides, etc. *Nonsupervisory Employees in State & Local Governments*, U.S. Department of Labor, Workplace Standards Administration, 1971 Report to Congress, pp. 52-57.

In addition, States and local bodies compete with each other for business investments, property development, population, tourist and convention business, and the like, which they seek to attract by offering lower taxes, subsidies, and other incentives. The public agency that pays substandard wages to its employees is to that extent in a better position to offer those inducements, and thereby enjoys a competitive advantage in essentially the same way as the low-wage employer in the private sector. Cf. *United States* v. *Darby*, 312 U.S. 100, 122.

The Advisory Commission on Intergovernmental Relations (created under P.L. 86-380, 42 U.S.C. 4271) notes that this type of competition is very much in the consciousness of State and local officials. Report on State-Local Taxation and Industrial Location, April 1967, p. 1. The Commission reports the trend to an "active role" by State and local governments "to create an 'economic climate' calculated to encourage business activity," of which a "very important part * * * is a tax structure which encourages economic growth" (*ibid.*). While the Commission also concludes that the tax differential factor is not the primary consideration in a business' choice of a region of the country in which to locate (*id.* at 78), it is one factor, and one which the States obviously believe is significant (*id.* at 1).

Paying subminimum wages is, of course, one way to permit the maintenance of a low tax policy helpful in the inter-regional competition for business development. This factor is a valid basis for Congressional legislation under the commerce power, since it provides a "rational basis," no less than in the case of private employers, for "the logical inference that the pay and hours of * * * employees affect [the employer's] competitive position" (*Maryland* v. *Wirtz*, *supra*, 39[illegible] U.S. at 190). A public body, striving in an interstate market for the attraction of investment and business activities into its localities, is subject to the same unfair competition as is a private employer when its rivals bring to bear the financial advantages of low wage scales.

C. Congress has power, under the Commerce Clause, to deal with the economic consequences of substandard labor conditions.

The State and local functions covered by the 1974 Amendments are a major segment of the economy, affecting commerce in numerous ways. As previously indicated, purchases of goods and services by State and local governments amounted to 135 billion dollars. In that year direct employment by State and local governments accounted for 9.7 million jobs, and employment generated by the purchase of goods and supplies by those activities accounted for an additional 3.7 million, making a total of 13.4 million jobs —more than 16 percent of the country's total civilian employment (119 Cong. Rec. S14057 (daily ed., July 19, 1973)).

This level of employment places a significant demand on the national job market. Based on the figures just stated, Senator Williams, the Chairman of the Senate Committee on Labor and Public Welfare, which reported out the 1974 Amendments, concluded (119 Cong. Rec. S14056-S14057 (daily ed., July 19, 1973)):

> This means that, on the average, each $1 billion of State and local government purchases that year generated almost 100,000 jobs. With the continued channeling of large amounts of Federal funds to States and localities, the spending of State and local governments will continue to create significant demand on the national job market.

The effect on commerce of spending and employment by State and local government was summarized in the Senate Report on the 1974 Amendments (S. Rep. No. 93-690, 93d Cong., 2d Sess. ("Senate Report"), p. 24):

> [T]here is no doubt that the activities of public sector employers affect interstate commerce and therefore that the Congress may regulate them pursuant to its power to regulate interstate commerce. Without question, the activities of government at all levels affect commerce. Governments purchase goods and services on the open market, they collect taxes and spend money for a variety of purposes. In addition, the salaries they pay their employees have an impact both on local economies and on the economy of the nation as a whole. The Committee finds that the volume of wages paid to government employees and the

activities and magnitude of all levels of government have an effect on commerce as well.

As large scale employers, State and local governments are implicated in all of the other Congressional policies underlying the 1974 Amendments, including the stimulation of the economy by additional consumer spending, the creation of new jobs by spreading employment and the reform of the welfare system. The Senate Report, p. 9, stated these policies as follows:

> The Committee also believes that [by] establishment of minimum wage rate * * * and [by] eliminating overtime exemptions where they have been shown to be unnecessary, the economy will be stimulated through the injection of additional consumer spending and the creation of a substantial number of additional jobs.
>
> The Committee also believes that by raising the minimum wage rate at a level which will at least help to assure the worker an income at or above the poverty level is essential to the reduction of the welfare rolls and overall reform of the welfare system in the United States.

The projected increase in consumer spending has an obvious and immediate impact on commerce and flow of goods. As the Senate Report noted (p. 12):

> The Committee recognized that a higher minimum wage may mean increased employer costs, but it also means increased purchasing power in the hands of the poor and a greater demand for goods and services.

The effects of the new minimum wages on the welfare system were also a legitimate object of congressional concern. The Senate Report recognized (p. 12) that "[f]or the Government, [a higher minimum wage] means lower welfare costs." Federal programs in which States participate include Aid to Families with Dependent Children (AFDC) and unemployment compensation programs.[22] The Senate Report, p. 12, illustrated the relation of the minimum wage laws to AFDC with the following example:

> Under the requirements of the Social Security Act with respect to Aid to Families with Dependent Children, for a family of four headed by a woman working fulltime a $.60 increase in the minimum wage would result in about a $.40 reduction in assistance or a reduction of $69 per month or $832 a year. There would be some variation among the states but in 33 states the full $69 per month reduction will be realized. In another 15 states reductions of less than $69 per month would be realized.

Because many employees working for less than a poverty-level wage are presently receiving supplemental assistance through welfare, an increased minimum wage will reduce welfare payments to

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[22] AFDC and unemployment compensation were established in the Social Security Act of 1935, 49 Stat. 610. AFDC is now codified in 42 U.S.C. 601 *et seq.* The unemployment compensation program is now codified in 42 U.S.C. 501 *et seq.* and the Federal Unemployment Tax Act (FUTA) in 26 U.S.C. 3301-3311.

fully-employed workers. The 1974 Amendments will thus directly affect the rising costs of AFDC (which in fiscal 1974 amounted to $7.5 billion, of which $4 billion was paid by the federal government)[23] and the food assistance programs (which in fiscal 1974 cost the federal government an estimated $5 billion).[24]

Similarly, the 1974 Amendments are intended to reduce both the needed level of those programs and the strain on unemployment insurance funds by generating new jobs. As the Senate Report, p. 9, noted, "eliminating overtime exemptions where they have been shown to be unnecessary" will lead to "the creation of a substantial number of additional jobs" (see also p. 19, n. 17, *supra*). This is a matter of considerable concern to Congress in light of the nation's rising unemployment[25] and the demand being placed on the unemployment funds.[26] To meet this growing problem, Congress recently enacted several statutes which provide federal assistance in pay

[23] U.S. Department of Health, Education, and Welfare, Office of Financial Management, Social and Rehabilitation Service Report No. 75-04011 (1974), p. 12.

[24] U.S. Department of Agriculture, 1975 Budget, Explanatory Notes, Vol. 3, p. 204.

[25] Between February 1974 and February 1975, the unemployment rate in the nation rose from 5.2 percent to 8.2 percent of the civilian work force. *News*, U.S. Department of Labor, Bureau of Labor Statistics, USDL 75-136, March 7, 1975.

[26] In the calendar year ended September 30, 1974, unemployment insurance benefits under State programs totaled $5.2 billion. *Unemployment Insurance Statistics*, U.S. Department of Labor, January 1975, Table 6.

benefits to the long term unemployed and to workers not covered by State unemployment insurance laws.[27]

More generally, in enacting the 1974 Amendments, Congress recognized that substandard wages were destroying the incentive to work and thus burdening the nation's welfare rolls. As former Secretary of Labor Shultz stated in his 1970 report to Congress (quoted in Senate Report, pp. 15-16):

> One of the major goals of this Administration is to get people off the welfare rolls and on to payrolls. Once having achieved that, unless the worker receives the minimum wage he is more likely to fall back on the welfare rolls.

[27] The Employment Security Amendments of 1970 (P.L. 91-373, 84 Stat. 695) extended benefits for an additional 13 weeks after State benefits would otherwise have ceased. The costs of extended benefits under the statute are shared equally by the States which paid benefits, and by the Federal government through payments to the States from the Unemployment Trust Fund created by the statute and funded by a Federal excise tax. The Emergency Unemployment Compensation Act of 1974 (P.L. 93-572, 88 Stat. 1869) provides for a second 13 week extension of unemployment benefits under State programs to be financed wholly by federal funds from the Unemployment Trust Fund. The Emergency Jobs and Unemployment Assistance Act of 1974 (P.L. 93-567, 88 Stat. 1845) provides unemployment insurance benefits for the substantial number of workers who are not covered under State unemployment insurance plans, including employees of State and local governments. Payments under this program are financed wholly by payments made by the United States to participating States, as necessary to meet the cost of benefits. Most recently, Congress has extended unemployment benefits under State programs for an additional 13 weeks (the third 13 week extension of such benefits) by passing H.R. 2166 (the Tax Reduction Act) on March 26, 1975.

The substantial impact of substandard wages and of unemployment on these major federal spending programs (AFDC, food assistance, unemployment compensation) was a legitimate concern of Congress in enacting the 1974 Amendments. Indeed, when that impact is considered along with the large proportion of total employment accounted for by state and local governments (p. 22, *supra*) and the fact that total federal financial aid to those governments far exceeds any possible cost by them of complying with the 1974 Amendments, it suggests an alternative constitutional basis for the enactment of those Amendments: it is legislation which is "necessary and proper" as an adjunct to the exercise of the congressional power to make these expenditures "for the * * * general Welfare of the United States" (Const., Art. I, Section 8). Cf. *United States* v. *Oregon*, 366 U.S. 643, 648-649.

In any event, poverty and unemployment have an effect on interstate commerce which the Congress is entitled to consider. In a different context, this Court observed that diminished spending—in that case, by Negroes who were refused service—"has, regardless of the absence of direct evidence, a close connection to interstate commerce." *Katzenbach* v. *McClung*, 379 U.S. 294, 299. Conversely, a minimum wage and the creation of new jobs (see *supra*, pp. 24-27) will have a direct effect on the purchase and movement of goods in commerce.

The federal commerce power is "not confined to the regulation of commerce among the states. It ex-

tends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end * * *." *United States* v. *Darby*, 312 U.S. 100, 118; *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119.[28]

Contrary to appellants' contention (N.L. Br., p. 41), the Commerce Power is not limited to strictly "commercial" matters;[29] it is broad enough to permit

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[28] *Gulf Oil Corp.* v. *Copp Paving Co.*, No. 73-1012, decided December 17, 1974, cited by appellant (Cal. Br., p. 40), is not to the contrary. There the Court held that the intrastate activities were not covered by the Robinson-Patman Act. The Court added, however, (slip op., pp. 8, 10) that, "[a]s in *Overstreet* [v. *North Shore Corporation*, 318 U.S. 125] and *Alstate* [*Construction Company* v. *Durkin*, 345 U.S. 13] [the Fair Labor Standards Act cases], there is no question of Congress' power under the Commerce Clause to include otherwise ostensibly local activities within the reach of federal economic regulation, when such activities sufficiently implicate interstate commerce. * * * 'If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze' " (slip op., pp. 8, 10).

[29] The Court has held that the Commerce Power extends to non-commercial and non-profit activities, including those which are governmental in nature. In *Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497, this Court rejected the contention that the term "commerce," as used in both the Constitution and the Fair Labor Standards Act, was limited to commercial activities, and held that the production of war materials at a government-owned plant, for subsequent transportation by the government for war purposes, constituted production "for commerce" (339 U.S. at 509-515). In so holding, the Court cited a number of decisions holding that the Commerce Clause power was applicable to a variety of "non-commercial"

Congress to deal with national economic problems. Thus in *North American Co.* v. *Securities & Exchange Commission*, 327 U.S. 686, in upholding the constitutionality of certain provisions of the Public Utility Holding Company Act, this Court indicated the breadth of the commerce power (327 U.S. at 705):

> This broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it is an affirmative power commensurate with the national needs. It is unrestricted by contrary state laws or private contracts. And in using this great power, Congress is not bound by technical legal conceptions. Commerce itself is an intensely practical matter. *Swift & Co.* v. *United States*, 196 U.S. 375, 398. To deal with it effectively, Congress must be able to act in terms of economic and financial realities. The commerce clause gives it authority so to act.

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movements or transactions, including: *Edwards* v. *California*, 314 U.S. 160 (1941) (movement of indigents across State lines); *Thornton* v. *United States*, 271 U.S. 414 (1926) (diseased cattle ranging across State lines); *United States* v. *Hill*, 248 U.S. 420 (1919) (transportation of liquor for one's own consumption). For other cases under the Fair Labor Standards Act, see *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F.2d 879 (C.A. 7), certiorari denied, 347 U.S. 1013 (employees of a church who were engaged in printing religious materials); and *Public Building Authority of Birmingham* v. *Goldberg*, 298 F.2d 367 (C.A. 5) (government employees engaged in processing claims for the payment of Social Security benefits were engaged in commerce-related activities). See also *National Labor Relations Board* v. *Central Disp. & E. Hosp.*, 145 F.2d 852 (C.A.D.C.), certiorari denied, 324 U.S. 847, holding that the National Labor Relations Act, as then worded, applied to a non-profit charitable hospital, and *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 256-257, where, in reviewing the types of interstate transportation which had been regulated under the Commerce Clause, this Court concluded: "Nor does it make any difference whether the transportation is commercial in character."

The concerns of Congress underlying the 1974 Amendments have as much application to employees of State and local governments as to employees generally. We consider hereafter appellants' claim to sovereign immunity (Part II); here, it is sufficient to observe that, in its effect on these concerns, payment of substandard wages by these entities is indistinguishable in principle from the payment of such wages by a private employer. This principle was recognized in a different context in *Case* v. *Bowles*, 327 U.S. 92, 100, where this Court upheld the application to a State of the Emergency Price Control Act of 1942:

> Excessive prices for rents or commodities charged by a State or its agencies would produce exactly the same conditions as would be produced were these prices charged by other persons.

II

THE EXTENSION OF THE FAIR LABOR STANDARDS ACT TO ADDITIONAL PUBLIC AGENCIES DOES NOT VIOLATE ANY CONSTITUTIONAL IMMUNITY OF THE STATES.

A. State and local governmental activities having a substantial effect on commerce are not immune from Congress' exercise of the commerce power.

Maryland v. *Wirtz* decisively disposed of the claim that the "[commerce] power must yield to state sovereignty in the performance of governmental functions" (392 U.S. at 195). The Court confirmed in that case that "valid general regulations of commerce do not cease to be regulations of commerce because a State is involved" (392 U.S. at 196-197). The Court concluded:

> This Court * * * will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States for the benefit of their citizens [392 U.S. at 198-199].

These observations in *Maryland* v. *Wirtz* reflect the uniform decisions of this Court that Congress may regulate State activities that have a substantial effect upon commerce.

In *Sanitary District* v. *United States*, 266 U.S. 405, for example, the United States sued to enjoin the diversion of water from Lake Michigan to dispose of sewage from Chicago, claiming that the diversion conflicted with the power of the United States

to regulate interstate commerce. The Court stated (266 U.S. at 426) that the power and authority of the United States to remove obstructions to interstate and foreign commerce was, without question, "superior to that of the States to provide for the welfare or necessities of their inhabitants." Similarly, in *United States* v. *California*, 297 U.S. 175, the Court upheld the application of the Federal Safety Appliance Act to a wholly intrastate nonprofit railroad operated by California to facilitate transportation to a port. The Court said (297 U.S. at 185):

> * * * [W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.

Appellants seek to distinguish *Maryland* on the ground that the 1974 Amendments—unlike the 1966 Amendments—interfere with "essential Government services" and "essential sovereign functions" (N.L. Br., pp. 44-45, 121; Cal. Br., p. 35). But the schools and hospitals covered by the 1966 Amendments were as much "essential government services" as any of the public agencies covered by the 1974 Amendments;[30] indeed they are more "essential" than li-

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[30] Cf. *Employees* v. *Missouri Public Health Department*, 411 U.S. 279, 296 (Marshall, J., concurring in the result). The opinion of the Court in that Eleventh Amendment case

braries, liquor stores, automobile inspection stations, and a great variety of public activities for which appellants here claim an across-the-board immunity.

In any event, *Maryland* recognized "that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character" (392 U.S. at 195). The conclusion in *Maryland* that the characterization of an activity as "governmental" does not affect Congress' power applied established constitutional doctrine. Thus, although the State activities in the California railroad case were of a commercial, though non-profit, nature,[31] the Court deemed it "unimportant

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(411 U.S. at 284) distinguished *Parden* v. *Terminal R. Co.*, 377 U.S. 184, by stating that "*Parden* was in the area where private persons and corporations normally ran the enterprise," whereas in the case of State mental hospitals, "the public sector took over." The Court said: "State mental hospitals, state cancer hospitals, and training schools for delinquent girls which are not operated for profit are not proprietary."

[31] The State railroad was operated "without profit, for the purpose of facilitating the commerce of the [State's] port," and, in the State's view, this constituted a "public function" which it "perform[ed] * * * in its sovereign capacity" (297 U.S. at 183). In language reminiscent of the claims made here, California argued at page 14 of its brief (No. 33, Oct. Term, 1935): "If it may be said that the State of California * * * is subject to the * * * Federal Safety Appliance Act, it follows that the State of California, in the exercise of its governmental functions in facilitating and expediting the commerce of its principal port, may exist only by leave of the federal government, and that the power lies with that government to prevent the state from discharging its sovereign functions for the general welfare of the people of California."

to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity" (*United States* v. *California*, *supra*, 297 U.S. at 183). In *Sanitary District*, *supra*, the disposal of Chicago's sewage was not a commercial function but a governmental health measure; it nevertheless had to defer to the federal commerce authority, because that authority "is superior to that of the States to provide for the welfare or necessities of their inhabitants" (266 U.S. at 426).

The same principle was applied in *Case* v. *Bowles*, *supra*, 327 U.S. 92, where it was argued that the Emergency Price Control Act of 1942 could not be applied to a sale by the State of Washington "because it was 'for the purpose of gaining revenue to carry out an essential governmental function—the education of its citizens.'" 327 U.S. at 101. The Court rejected the view that "whether [state functions] are 'essential' to the state government" is a proper "criterion in measuring the constitutional power of Congress" (*ibid.*).[32]

Nor may an otherwise valid exercise of the commerce power be invalidated because it may, in some

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[32] This Court's decision in *Employees* v. *Missouri Public Health Department*, *supra*, is not to the contrary. The Court there drew distinctions between state activities for purposes of the Eleventh Amendment's specific limitation on permissible remedies, but specifically noted that the exercise of Congress' commerce power there involved could be enforced by means of suits by the Secretary of Labor (411 U.S. at 285-286) and possibly by employee suits in the state courts (411 U.S. at 287). See, *infra*, p. 64.

instances, supersede or conflict with a State statute or constitutional provision (N.L. Br., p. 86). As this Court pointed out in *Sanitary District*, *supra*, "the action of Congress overrides what [the States] have done" (266 U.S. at 426). See also *Sperry* v. *Florida*, 373 U.S. 379, 403. And in *California* v. *Taylor*, 353 U.S. 553, this Court upheld the application of the Railway Labor Act to a railroad owned and operated by the State of California, even though the Act precluded the State from applying its own civil service laws. As the Court noted (353 U.S. at 560), the State laws were "the antithesis" of the Railway Labor Act, which required the State, contrary to its own laws, to consult and bargain with employee representatives and to submit employee grievances and questions of contract interpretation to the National Railroad Adjustment Board.

B. The concerns expressed by the dissenters in *Maryland* v. *Wirtz* do not justify invalidating the 1974 Amendments.

Underlying all commerce power cases is the issue of federalism. The Court's concern must necessarily be to preserve the proper constitutional balance between national and state governments. We think that balance is not disturbed by the 1974 Amendments. In order to demonstrate that, we will address directly the concerns expressed in Mr. Justice Douglas' dissent, concurred in by Mr. Justice Stewart, in *Maryland* v. *Wirtz*.

Standing by themselves the 1974 Amendments do not appear a very serious threat to the federal-state

balance. The federal law does not impose any policy objective upon the States or deny to them the power to choose their own objectives. It imposes only the minor constraint of requiring that, whatever a State may choose to do and however it may choose to do it (matters which remain solely within the State's discretion), it must, as to certain employees, satisfy very minimum standards as to wages and hours.

The issue raised by the dissent in *Maryland* is the degree of impact a particular federal measure has upon State sovereignty. The dissent distinguished the precedents we have cited in the preceding section on the ground that "In none of these cases, however, did the federal regulation overwhelm state fiscal policy. It is one thing to force a State to purchase safety equipment for its railroad and another to force it either to spend several million more dollars on hospitals and schools or substantially reduce services in these areas." 392 U.S. at 203.

That the issue is one of degree of impact is also apparent from questions posed by the dissent (392 U.S. at 204-205):

> * * * If constitutional principles of federalism raise no limits to the commerce power where regulation of state activities are concerned, could Congress compel the States to build superhighways crisscrossing their territory in order to accommodate interstate vehicles, to provide inns and eating places for interstate travelers, to quadruple their police forces in order to prevent commerce-crippling riots, etc.? Could the Congress virtually draw up each State's budget

to avoid "disruptive effect[s] . . . on commercial intercourse."? *Atlanta Motel* v. *United States*, 379 U.S. 241, 257.

We agree, of course, that Congress may not employ the commerce power to destroy the sovereignty of the States guaranteed by the Constitution. And the dissent agrees that much federal regulation may be applied to the States through exercise of the commerce power. The question, therefore, is necessarily one of degree. Can the Court say that federalism itself will be imperiled if the Act passed by Congress is upheld? We think that clearly no such conclusion is appropriate in this case.

There are a variety of ways of demonstrating that the 1974 Amendments will not harm State sovereignty. We have already pointed out that no policy goal of any State is foreclosed by the federal statute and that the law imposes only the minimal constraint that State policies not be carried into effect by State imposition of substandard working conditions.

That this constraint is minimal and not of the exaggerated proportions described by appellants is shown by our discussion, *infra*, pp. 40-52. That effect can hardly be said to carry the result of "overwhelming State fiscal policy." Such a prediction is not only unrealistic on these facts but is made even less realistic by recognition that the federal government subsidizes State budgets in a variety of ways. See *supra*, pp. 15, n. 12, 23, 25-27. This shows that the impact upon the States is small in absolute terms.

That impact is also small in relative terms, that is, by comparison with other, clearly allowable, federal regulations of state policy independence. The *Maryland* dissent suggests that the rationale of the majority opinion would permit the Congress to draw up the States' budgets. But that result does not follow precisely because the rationale of *Maryland* is necessarily limited by the countervailing value of federalism. It is this Court's role to adjust those two values, allowing full scope to the commerce power given Congress by the Constitution but, in an appropriate case, refusing to permit that power to destroy effective State and local government.

Thus, the power of Congress to set minimum wages and maximum hours does not, by any stretch of the imagination, imply a power to draw up the States' budgets. There is an obvious parallel. The power of Congress to preempt State law by federal legislation does not imply the power to enact the entirety of the States' legal codes. If it did, this Court would never have sanctioned the doctrine of preemption. There is an example very close to this case. In enacting the National Labor Relations Act, Congress ousted most state control of the subject of labor relations. This Court did not strike down the Act on the theory that upholding it would necessarily mean that Congress could repeal all State laws and substitute its own code. Now, when Congress has dealt with another aspect of labor conditions, there is not, we submit, any occasion to declare it unconstitutional on the theory that a decision upholding the law would lead to full control of state budgets.

Moreover, to the degree that these situations are not completely parallel and that the National Labor Relations Act and the 1974 Amendments to the Fair Labor Standards Act have different impacts upon State sovereignty, the comparison favors the Amendments here under review. There is less reason for this Court to feel concern about the minor fiscal constraint here imposed than about federal legislation that ousts State law and policy in an area. The 1974 Amendments may set remote outer limits upon State policy choice; federal preemption of an area by substantive law destroys the States' power to make any policy choice. If the latter is constitutionally permissible, and there is no doubt it is when the aggregate of federal preemptions does not make State government meaningless, the former should plainly be allowable.

Some degree of political realism is also called for. Congress has no desire in either the fiscal or the substantive area to obliterate federalism and State sovereignty, to press its practice of making limited regulations to a point of logical and constitutional absurdity. Congress' sense of appropriate limits to the exercise of its power under the Commerce Clause is evident in the legislation here under review. Thus the 1974 Amendments specifically exclude from coverage any individual who "holds public elective office" or is appointed by such an officeholder to be a "member of his personal staff" or "to serve on a policymaking level," or is an immediate advisor to such officeholder "with respect to the constitutional

or legal powers of his office" (29 U.S.C. 203(e)(2)(C); N.L. Brief App., p. 4a).

It is highly unlikely, given American political realities, that there ever will be a Congress with an ambition to obliterate federalism and State sovereignty. See Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Columbia L. Rev. 543 (1954). But if one could imagine a future Congress manifesting such a desire, this "Court has ample power to prevent * * * 'the utter destruction of the State as a sovereign political entity.'" 392 U.S. at 196.

We must always be concerned about the preservation of federalism. But that concern is not best translated into constitutional law by striking down a statute like this on the theory that any principle may be pushed so far as to obliterate equally important opposing principles. The task of judicial judgment is one of assessing balances and degrees. To draw the line here would be to draw it in the wrong place, at the wrong time, for the wrong reasons.

C. The 1974 Amendments do not "take over" State and local governmental functions.

Appellants' claims that the 1974 Amendments are a "take-over" of State and local government budgets and personnel (N.L. Br., pp. 2, 41, 55, 58, 112; Cal. Br., pp. 39, 41) are not factually accurate; the present Act, like the 1966 Act, interferes with state and city functions only to the extent that it requires "a minimum wage and a maximum limit of hours unless

overtime wages are paid, and does not otherwise affect the way in which * * * duties are performed" (*Maryland* v. *Wirtz*, *supra*, 392 U.S. at 193). The 1974 amendments extend the Act's coverage to the same type of employees as were initially covered by the 1966 Amendments: *viz.*, nonsupervisory civil service employees who are neither elected nor appointed to policymaking positions or to the personal staffs of elected officials. The 1974 extension, like that of 1966, "establishes only a minimum wage and a maximum limit of hours unless overtime wages are paid," and like the 1966 Act, "does not otherwise affect the way in which * * * [a public agency's] duties are performed" (*ibid.*).

There is thus no basis for appellants' contention that the 1974 Amendments "usurp" control of the "terms and conditions of employment" (N.L. Br., pp. 2, 41). The minimum wage requirements do nothing more than set a floor below which wages may not fall; they require only that the wage be at least $1.90 (now $2.00) an hour. Even this minimum obligation affects only the relatively small number (approximately 3.6 percent) of public employees being paid less than the specified minimum (*supra*, p. 16).[33]

[33] Appellants also err in stating that the Amendments were added "largely upon the false representations [that they would have] no impact" upon the State and local governments (N.L. Br., p. 89). Although the House report noted that the "wage levels for State and local government employees not covered by the FLSA"—*i.e.*, non-school and non-hospital employees—were "on the average" higher than the wage levels for workers already covered (H. Rep. No. 93-913, 93d Cong., 2d Sess., *supra*, at pp. 28-29), they also estimated that the extension of coverage to additional public employees would increase the wage costs of State and local governments by one or two percent. See discussion *infra*, pp. 43, 47-52.

Indeed, most of these employees (an estimated 314,000 out of 409,000) are among those who were first covered by the 1966 amendments."

The only restriction imposed by the Act's overtime requirements—which is the same restriction as that of the 1966 Amendment—is that, except where an overtime pay exemption is provided, the employer must pay a premium rate for the hours worked in excess of 40. This premium rate can be avoided if the employer uses other employees to do the overtime work. This, in effect, tends to discourage overtime work and to spread employment, which is the result Congress intended. (See discussion *supra*, pp. 24, 26 and Senate Report, p. 9; see also *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 40; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 423-424.

While appellants object to this interference with their practice of using full-time workers in various government jobs (N.L. Br., p. 85), the spreading of employment is no less valid an objective of national

[34] In this respect, the 1974 Amendments are quite different in their impact from the Economic Stabilization Act of 1970 (84 Stat. 799, now repealed), which imposed controls on the wages of *all* State and local government employees, and not just on those few who were paid less than a minimum living wage. See *Fry* v. *United States*, No. 73-822, pending decision of this Court; see also *Coan* v. *California*, 113 Cal. Rptr. 187, 203, (Sup. Ct.), 520 P.2d 1003, 1019 (dissenting opinion). See also *infra*, pp. 43-52.

labor policy in the large sector of public employment than in the sector of private employment, as Congress noted. S. Rep. No. 89-1487, 89th Cong., 2d Sess., p. 22; H. Rep. No. 89-871, 89th Cong., 1st Sess., pp. 30-31; Background Material on the Fair Labor Standards Act Amendments of 1973, *supra*, at p. 298; 112 Cong. Rec. 11282, 11284, 20481, 22652. In any event, as this Court said with respect to a similar complaint about the overtime provisions of the 1966 Amendments, these "are matters outside judicial cognizance" (*Maryland* v. *Wirtz*, *supra*, 392 U.S. at 194, n. 22).

D. The financial burdens of complying with the 1974 Amendments do not affect their validity and, in any event, are vastly overstated by appellants.

The minimum wage and overtime requirements of the 1974 Amendments will not, as appellants contend, "dictate 85% of City and State budgets" (N.L. Br., p. 112). On the contrary, reports published by Congress estimate that the increased costs of these requirements (assuming that employment is not spread to avoid overtime) will amount to less than two percent of the total wage costs of the State and local governments.[35] Moreover, some of this

[35] For example, an increase in the minimum wage to $1.80 in 1973 would have cost the State and local governments an estimated $128 million a year, which represented an increase of only 0.3 percent in their total wage bill; an increase to $2.00 in 1974 would have cost an estimated $162 million a year, which represented an 0.5 percent increase in the wage costs. Background Material on the Fair Labor Standard Act Amendments of 1973, 93d Cong., 1st Sess., p. 220. (National

cost will be borne by the federal government, whose aid to State and local governments far exceeds any possible costs of compliance.[36]

In any event, as appellants acknowledge (N.L. Br., p. 37), the cost of complying with the Act's minimum labor standards would not be a basis for invalidating an otherwise valid Congressional regulation. In *Employees* v. *Missouri Public Health Department*, *supra*, 411 U.S. at 279, 284, this Court, in discussing the cost impact of the 1966 Amendments to the Fair Labor Standards Act, stated that the validity of Congressional action under the commerce power is not affected by the fact that "it may place new or even enormous fiscal burdens on the States." Such considerations "raise not constitutional issues but questions of policy. They relate to the wisdom, need, and effectiveness of a particular project. They are therefore questions for the Congress, not the courts" (*Oklahoma* v. *Guy F. Atkinson Co.*,

League's brief mistakenly states that Congress estimated that the first year costs were $28 million; N.L. Br., pp. 12, n. 8, 39). The estimated increase for overtime compensation was 1.0 percent, but in actual effect it would be less since more than 40 percent of the employees are already entitled to premium overtime pay under State or local laws or ordinances. H.Rep. No. 93-913, 93d Cong., 2d Sess., pp. 28-29; *Non-supervisory Employees in State & Local Governmentals*, *supra*, at pp. 25 and A-46, Table 44.

[36] In 1975, Federal aid to State and local governments will total approximately $52.0 billion and "will finance about 22% of State and local expenditures" (Executive Office of the President, Office of Management and Budget, *Special Analyses, Budget of the United States Government*, pp. 203, 205 (Washington, D.C. 1974)).

313 U.S. 508, 527). "Nor," said the Court, "is it for us to determine whether the resulting benefits to commerce as a result of this particular exercise by Congress of the commerce power outweigh the costs of the undertaking" (313 U.S. at 528). See also *Sanitary District, supra*, 266 U.S. at 432.[37]

In any event, appellants' cost estimates are largely without foundation and, in significant respects, misconceive the Act.

Paragraph 44 of the verified complaint of appellants National League, *et al.* (I App., p. 28) asserts: "Increased costs for other essential State and City governmental functions are reasonably certain to amount to billions of dollars per year due to the impact of these 1974 Amendments to the Act." The figure is reiterated in appellants' brief (N.L. Br., p. 11). Yet Allen E. Pritchard, Jr., the Executive Vice President of National League, who verified the complaint as to the cities' claims (I App., p. 39), acknowledged in depositions taken by the appellee that he was "not prepared at this time to go through the calculations to indicate where that billions of dollars per year comes from" (I App., p. 245). Similarly Charles A. Byrley, the Executive Director of

[37] Similarly the comments of the two former Secretaries of Labor and of the former President, relied on by appellants (N.L. Br., pp. 82-83), raise questions of policy. There were of course differences of opinion expressed in the pre-enactment debate as to the wisdom of extending the Act's wage standards to the States. In the end, however, these differences were resolved by the final action of Congress in passing the 1974 Amendments and of the President in approving them.

appellant National Governors' Conference, who verified the complaint as to the States' claims (I App., p. 40), admitted that he had never seen any calculations indicating the sources of this alleged increased cost (I App., p. 262). Appellants thus provide no substantiation for their claim of costs of "billions of dollars per year."

Where appellants' claims of impact are sufficiently specific to permit analysis, they are likewise without foundation. Appellants state, for instance, that the Amendments require "vast new Federal records, and reports" (N.L. Br., p. 122) and that these "burdensome record keeping requirements" (N.L. Br., pp. 84, 87) will cost $800,000 a year in the case of Florida [38] and an "*inestimable* amount" throughout the nation (Cal. Br., p. 14; emphasis in original).

In fact, however, the Act does not require the preparation or filing of any reports. The records themselves do not have to be kept in any particular form, and need only show the employee's name, age, address, social security number, daily hours,[39] and total wages earned each pay period (29 C.F.R. 516.2). The records contemplated by the Act require only the most basic kind of employment information, which

[38] Governor Askew, in submitting this figure to appellants (II App., pp. 575-576), did not explain the basis for his estimate.

[39] Records for exempt administrative, executive and professional employees need not show any daily or weekly hours, but only the time and day on which the employee's workweek began. 29 C.F.R. 516.3.

the States and local governments necessarily presently maintain for their own purposes.

Appellants themselves acknowledge that the Act's minimum wage requirements will not have a major impact on their budgets (I App., p. 124; N.L. Br., pp. 79-80).[40] They do cite two cost examples, but these reflect misconceptions of the Act's requirements. Thus California (Cal. Br., p. 18) estimates that the cost of complying with respect to its Ecology Corps employees (who were paid 75 cents an hour) at one million dollars; in fact, however, under Section 3(m) of the Act (29 U.S.C. 203(m)), the State could count toward its minimum wage obligation the cost of providing these employees with room and board (and, depending on the circumstances, the cost of the uniforms).

Appellants also mistakenly assert that "volunteers" must now be paid the minimum wage (N.L. Br., pp. 83-85). According to one report they cite (N.L. Br., p. 84, n. 65), the cost of replacing volunteers with paid firefighters will be $4.5 billion. But nothing in the Act or in the Department of Labor's regulations prohibits the use of volunteers or requires that they be paid the minimum wage. Nor

[40] National League itself reported to Congress that the dollar impact of the minimum wage requirements would not be "substantial." Hearings before the General Subcommittee on Labor of the House Committee on Education and Labor on H.R. 4757 and 2831, 93d Cong., 1st sess., (House Hearings), p. 154. This reflects the fact, as explained by the National League's Executive Vice President, Mr. Pritchard, that as to the minimum wage requirements "most cities were already in compliance in most cases" (I App., p. 124).

has the Department determined, as appellants assert (N.L. Br., p. 85, n. 66), that the payment of $2.50 per call automatically precludes a firefighter from "volunteer" status. What the regulations do provide is that payments in this amount will be presumptive evidence of volunteer status; the regulations expressly recognize that "[p]ayments in excess of this amount" may also be consistent with a volunteer status, "depending upon the * * * expenses incurred by the volunteer." 29 C.F.R. 553.11, II App., p. 611.[41]

Appellants' principal assertion of cost impact is made with respect to the Act's overtime requirements. The only specific national figure cited as an estimated cost is $200 million for fire protection services (N.L. Br., p. 11), considerably less than that vague "billions of dollars per year" alleged in the complaint. Firefighting services will in fact account for most of the overtime costs of public agencies,[42] but the $200,000,000 figure is demonstrably overstated, since it is

[41] Appellants also erroneously assume that volunteers engaged in other activities, and not dealt with in 29 C.F.R. 553.11, must be paid the statutory minimum. In fact, however, as 29 C.F.R. 785.44 affirmatively advises, volunteer participation in civic and charitable work is not counted as working time for purposes of the Act. The question whether an individual is an employee or a volunteer is ultimately one for the courts, and is not a matter for final decision by the Department of Labor. See, *e.g.*, *Walling* v. *Portland Terminal Co.*, 330 U.S. 148.

[42] National League reported to Congress, "the dollar impact of the overtime provisions is largely due to police and fire shifts" (House Hearings, *supra*, at p. 154). However a 1974 report prepared by the International City Management Association shows that police average only 39 to 40 hours per week. Urban Data Service, Report 9/74, p. 4.

based on the explicit assumption that numerous local governments will fail to take advantage of the partial overtime exemption provided by Section 7(k) of the Act (29 U.S.C. 207(k); N.L. Br. App., p. 5a). Under this section, no overtime compensation is required unless the employees work an average of over 60 hours per week in any 28 day period.

Appellants themselves note that only 15 percent of the public fire protection agencies (about 10 percent of the firefighting personnel) work in excess of 60 hours per week (II App., p. 627-628; see also 120 Cong. Rec. H 2297 (daily ed., March 28, 1974)). Appellants' own calculation of the estimated overtime costs for these agencies is $30,499,000 for the first year (II App., p. 628)—which figure is close to the Department of Labor's estimate of $27,000,000 (29 C.F.R. 553; II App., p. 596, 621-624). Of the remaining $169.5 million, $165.8 million is appellants' estimated cost for employers who, as already indicated, qualify for the Section 7(k) exemption (II App., pp. 630, 635).

In assuming that some firefighting agencies will not qualify for the Section 7(k) exemption, appellants erroneously assume that the employer must expressly "declare" a work period of from 7 to 28 days, and that the work period must coincide with the employee's fire "duty cycle," which in Texas is set by law at 365 days (N.L. Br., p. 32). There are, however, no such requirements in Section 7(k),[43] and, in-

[43] The Department of Labor does require that a "notation" be made in the employer's records of the work period applicable to each employee (29 C.F.R. 553.16(b), 553.21; II App., pp. 616-617, 620), but this is a recordkeeping requirement and not a condition of the exemption. None of the "regulations" issued by the Department under Section 7(k), other than the recordkeeping requirements, has the force and effect of law. Section 7(k) is self executing; the regulations are therefore only interpretative and were issued for the express purpose of assisting public agencies in understanding their new statutory obligations (29 C.F.R. 553; II App., pp. 592-593). Thus, in the example which appellants cite as "[t]he most commonly used fire duty cycle in the nation" (II App., p. 632), in which the employee alternates 24 hours on and 48 hours off duty, there would be no requirement for overtime pay under Section 7(k), since the employees, in every two week period, would work only 120 hours or 60 hours a week. Moreover, the exempt status of these employees is not affected by the Department of Labor's interpretative ruling that "sleep and meal time" must, for purposes of the Fair Labor Standards Act, be counted as hours worked where the employee is on duty for 24 hours or less, but can be excluded from hours worked where the employee is on duty for more than 24 hours (29 C.F.R. 553.15; II App., pp. 615-616). This ruling corresponds to both judicial and interpretative rulings in the private sector (*see, e.g., Armour & Co.* v. *Wantock*, 323 U.S. 126; 29 C.F.R. 785.21-785.22), except that in the private sector the employer can exclude uninterrupted sleep and meal time where the employee is on duty for at least 24 hours. In departing in this one instance from the "hours of work" concept used in the private sector, the Department was conforming its interpretation to the explicit legislative history (S. Rep. No. 93-758, 93d Cong., 2d Sess., p. 27; 120 Cong. Rec. S4692 (daily ed., March 28, 1974)). This interpretation did not represent a "shocking reversal * * * of customary practices" (N.L. Br., p. 119); it was first announced on May 17, 1974, 39 days after the enactment of the 1974 Amendments (39 Fed. Reg. 17596) and it followed what the public hearings established was the usual practice in most fire departments (official Report of the Proceedings, June 3 and 4, pp. 80, 121, 137, 209). If, however, there exist some fairly unique factual situations where public agencies would actually be "disadvantaged" by Section 7(k)

sofar as can be determined from the facts stated in appellants' exhibits, the jurisdictions where fire protection employees average 60 hours or less a week apparently qualify for exemption from the Act's overtime requirements.

California also overestimates the overtime cost for firefighters employed by the State Department of Conservation, which it places at $23 million (Cal. Br., pp. 15-17). This estimate is based on the fact that California firefighters work an 84-hour week during the fire season, as follows: "four 24-hour days on, three 24-hour days off, followed by three 24-hour days on and four 24-hour days off" (Cal. Br., p. 12, n. 7). California erroneously assumes that under this schedule it will have to pay 24 hours of overtime compensation each week. In fact, however, since the firefighters are on continuous duty for *more* than 24 hours, sleep and meal time does not have to be counted as hours worked, and weekly compensable hours thus would not exceed 60. See, *supra*, p. 50, n. 43.

Nor do the 1974 Amendments interfere with California's compensatory time-off arrangements for firefighters. Under California law, "comptime" or other overtime compensation must be paid for all weekly hours worked over 40. Since the Federal overtime requirements do not apply until after the employee has worked 60 hours, however, the overtime hours

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(as appellants claim; N.L. Br., p. 118), they are not required to calculate overtime under that Section and may calculate overtime according to the rule applicable to private employers.

between 40 and 60 may be paid for in any manner consistent with State law. See 29 C.F.R. 553.19, II App., pp. 619-620.

E. Since the 1974 Amendments were within the delegated power to regulate commerce, they were not precluded by the Tenth Amendment's reservation to the States of "powers not delegated."

Appellants' contentions with respect to the Tenth Amendment add nothing to their case. As shown above, the extension of the Act to public employers is within the power of Congress under the Commerce Clause (properly interpreting that power in light of the considerations of federalism discussed at pp. 35-40, *supra*). The Tenth Amendment does not limit that power, since the Amendment in terms reserves to the States only those powers which are "not delegated to the United States." As this Court has recognized, the Tenth Amendment "states but a truism that all is retained which has not been surrendered" (*United States* v. *Darby*, *supra*, 312 U.S. at 124; *Sperry* v. *Florida Bar*, 373 U.S. 379, 403).

"There is nothing in the history of [the Tenth Amendment's] adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment * * *" (*United States* v. *Darby*, *supra*, 312 U.S. at 124). The amendment was adopted "to allay fears that the new national government might seek to exercise powers not granted" by the then recently adopted Constitution and "to confirm the understand-

ing of the people at the time the Constitution was adopted" (*ibid.*;" *United States* v. *Sprague*, 282 U.S. 716, 733). As James Madison noted while the Tenth Amendment was pending adoption and during the debate on a proposed establishment of a national bank:

> Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States. [II Annals of Congress, p. 1897 (1791), quoted in *Sperry* v. *Florida Bar*, *supra*, 373 U.S. at 403.]

Accordingly, when the Tenth Amendment was asserted as an affirmative limitation upon congressional power, in the first Commerce Clause case to reach this Court, the limitation was unequivocally rejected (*Gibbons* v. *Ogden*, 9 Wheat. 1). As summarized by Frankfurter in *The Commerce Clause under Marshall, Taney and Waite* (1937), p. 40, "[Chief Justice] Marshall not merely rejected the Tenth Amendment as an active principle of limitation; he countered with his famous characterization of the powers of Congress, and of the commerce power in particular, as the possession of the unqualified authority of a

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" Citing, II Elliot's Debates, pp. 123, 131 (2d ed., 1787); III Elliot's Debates, pp. 450, 464, 600-601 (2d ed., 1787); IV Elliot's Debates, pp. 140-141, 148-149 (2d ed., 1787); I Annals of Congress, pp. 432, 761, 767-768 (1789); Story, *Commentaries on the Constitution*, §§ 1907-1908 (2d ed., 1851).

unitary sovereign." The reference is to the following passage in *Gibbons* v. *Ogden*, *supra*:

> If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States [9 Wheat. at 197].

This passage remains a keystone of constitutional jurisprudence. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 255.

There is accordingly no ground for asserting at this late date that the Tenth Amendment undermines the validity of an otherwise proper exercise of a delegated power when the affected party is a State. This Court specifically rejected that contention when it was asserted as a bar to the application of federal price regulations to State bodies. *Case* v. *Bowles*, 327 U.S. 92, 102. The argument likewise did not prevent the application of the commerce power to restrict activities of the City of Chicago in the operation of its municipal sewage system (*Sanitary District* v. *United States*, 266 U.S. 405), to impose duties on the purchase of scientific apparatus by the State-owned University of Illinois (*Board of Trustees* v. *United States*, 289 U.S. 48), to apply Federal safety regulations to a State-owned nonprofit local railroad (*United States* v. *California*, 297 U.S. 175, 185),

or to impose the wage standards of the Fair Labor Standards Act on State-owned schools and hospitals (*Maryland* v. *Wirtz*, *supra*, 392 U.S. 183).

Appellants' attempt to distinguish the instant case by the wider scope of the application of the 1974 Amendments and their greater financial impact are dealt with above (*supra*, pp. 35-52). The impact of the federal law upon preservation of State sovereignty is properly considered in determining the reach of Congress' commerce power. There is no occasion to consider that factor over again in the context of the Tenth Amendment, which, as this Court has said, "does not operate as a limitation upon the powers, express or implied, delegated to the national government" (*Case* v. *Bowles*, *supra*, 327 U.S. at 102). Where the destruction of State sovereignty is not involved, as it certainly is not here, the only limitation in the Constitution upon the exercise of the Congressional power over commerce is that the federal action must be rationally related to that power. "As long ago as *Sanitary District* v. *United States*, 266 U.S. 405 [this] Court put to rest the contention that state concerns might constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce" (*Maryland* v. *Wirtz*, *supra*, 392 U.S. at 195-196)."[45]

[45] Although appellants suggest that the commerce clause language in *Sanitary District* was mere "dictum" (N.L. Br., pp. 124-125) and "cannot be read without reference to the treaty power" (*ibid.*), this Court specifically stated that the commerce clause power was "the main ground" for its decision (266 U.S. at 425).

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Appellants rely on *New York* v. *United States*, 326 U.S. 572, and other cases decided under the federal taxing power to support their claim that essential State functions are immune from Federal regulation under the Commerce Clause (Cal. Br., p. 25). This reliance is misplaced. Whatever the import of those decisions with respect to limitations on the levying of federal taxes on organs or instrumentalities of the States, any attempt to limit the exercise of the commerce power by analogy is inappropriate.

Congress must be accorded broad freedom to regulate commerce without limitations imposed by claims of sovereign immunity merely because State interests are affected, if the ends for which the commerce power was created are to be accomplished.

In rejecting similar claims of limitations on another broad delegated power the Court said (*Case* v. *Bowles*, *supra*, 327 U.S. at 102): "The result would be that the constitutional grant of the power to make war would be inadequate to accomplish its full purpose. And this result would impair a prime purpose of the Federal Government's establishment." If activities of States or local governments, such as the imposition of substandard labor conditions, that burden commerce cannot be proscribed, "a prime purpose of the Federal Government's establishment" would be impaired.

For this reason, the Framers of the Constitution intended that the commerce power "though limited to specified objects, is plenary as to those objects" (*Gibbons* v. *Ogden*, 9 Wheat. 1, 197). The

taxing power, on the other hand, does not have ends which would be comparably frustrated if a particular manner of its exercise were proscribed, and the States thus retained concurrent jurisdiction. *New York* v. *United States, supra,* 326 U.S. at 576. This distinction is explained in *United States* v. *California, supra,* 297 U.S. at 184-185:

> * * * the constitutional immunity of state instrumentalities from federal taxation * * * is implied from the nature of our federal system and the relationship within it of state and national governments [citation omitted]. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power * * * which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it. * * * Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.

Also misplaced is appellant's reliance on *Employees* v. *Missouri Public Health Department, supra.* The Court did not, as appellant suggests, "refus[e] * * * to surrender [the States'] Tenth Amendment sovereignty" over their "governmental" activities (Cal. Br., pp. 46-47). On the contrary, the Court—while refusing to presume that Congress had lifted the States'

immunity from suits in a federal forum by its employees—expressly reaffirmed the Act's application to such "governmental" activities as the operation of "state mental hospitals, state cancer hospitals, and training schools for delinquent girls" (411 U.S. at 284-285).

In *Maryland* v. *Wirtz, supra,* 392 U.S. at 195, this Court sustained the 1966 Amendments because it found that "a 'rational basis' exists for congressional action prescribing minimum labor standards for schools and hospitals * * *." Nevertheless, appellants argue that the "rational basis" test is not an appropriate standard for assessing the constitutionality of the 1974 Amendments; rather, they suggest that "the Government should be required to bear the burden of establishing that * * * [the 1974 Amendments are] supported by a compelling national interest" (Cal. Br., p. 24; see N.L. Br., pp. 96-97). While "[t]here may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments" (*United States* v. *Carolene Products Co.,* 304 U.S. 144, 152, n. 4), none of the specific Bill of Rights protections is infringed by the 1974 Amendments.

Although the legislation must meet the Fifth Amendment's standard of due process, that is precisely the "rational basis" test applied by the Court in *Maryland* v. *Wirtz.* The rational basis test is the proper standard for assessing the constitutionality

of legislation, unless it threatens to infringe the personal liberties protected by the Bill of Rights.[46] See, *e.g.*, *Thomas* v. *Collins*, 323 U.S. 516, 530. Since the Tenth Amendment merely reserves to States powers not delegated, no otherwise valid exercise of a delegated power could "appear * * * on its face to be within a specific prohibition of the Constitution" (*United States* v. *Carolene Products Co.*, *supra*, 304 U.S. at 152, n. 4).

Moreover, even if the preferred freedoms of the Bill of Rights were implicated, there would be no objection to the 1974 Amendments. This Court has previously sustained the application of the Fair Labor Standards Act to newspapers, against the claim that such an application of the Act would interfere with the freedom of the press guaranteed by the First Amendment. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 192-193; *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178, 184; see also, *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103, 116.

In any event, we do not merely rely on presumption of constitutionality. Our submission, based on the legislative reports and pertinent background materials, is that Congress had a "rational basis" for extending the Fair Labor Standards Act to additional State and local government employees. Appellants were not able to persuade Congress of

[46] The States and local governments are not, of course, "persons" within the contemplation of the Fifth Amendment. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-324.

their view that the 1974 Amendments were unwise or unnecessary. They now ask this Court to review Congress' judgment; this the Court cannot properly do. *Oklahoma* v. *Guy F. Atkinson Co.*, *supra*, 313 U.S. at 527.

F. The Eleventh Amendment is invoked prematurely and is, in any event, not applicable to suits brought by the Secretary or in State courts.

Appellants' contention that the Eleventh Amendment bars the Secretary from suing the States for enforcement is premature and, in any event, groundless. It is premature in that once the validity of the 1974 Amendments has been adjudicated, there will then be occasion to consider what forms of enforcement are constitutionally available. *Maryland* v. *Wirtz*, 392 U.S. 183, 200:

> The constitutionality of applying the substantive requirements of the Act to the States is not, in our view, affected by the possibility that one or more remedies the Act provides might not be available when a State is the employer-defendant.

The Act provides for suits by the Secretary and by aggrieved employees; it authorizes suits for back pay and for injunction; it authorizes suits in federal and State courts.[47] The application of the Eleventh Amendment to the various combinations of these litigation possibilities must be considered separately. What is relevant to suits in federal court may have

[47] See 29 U.S.C. 216(b), 216(c) and 217.

no bearing on suits in State courts; suits by the Secretary are different in their relation to the Eleventh Amendment from suits by private plaintiffs; and the considerations applicable to money suits are not the same as those applicable to suits to compel compliance. Moreover, it is likely that many States and municipalities, once assured of what their obligations are under the Act, will comply with those requirements, as many already have.

The question of how the Act may be enforced against noncomplying States should await the determination whether the substantive provisions of the Act may constitutionally be applied to them, and should be considered in light of the particular form of enforcement that may be sought. As this Court said in *Maryland* (392 U.S. at 200):

> Percolating through each of [the Act's several] provisions for relief are interests of the United States and problems of immunity, agency, and consent to suit. * * * They are almost impossible and most unnecessary to resolve in advance of particular facts, stated claims, and identified plaintiffs and defendants. [Citations omitted.]

In any event, appellants' Eleventh Amendment contentions are unsound. It has uniformly been held for almost a century that the States' immunity to suit in federal court, whether under the Eleventh Amendment or under the doctrine of *Hans* v. *Louisiana*, 134 U.S. 1, does not extend to suits brought by the United States. *United States* v. *Texas*, 143 U.S. 621, 641-646; *Sanitary District* v. *United States*, 266 U.S. 405, 425-426; *United States* v. *California*,

supra, 297 U.S. at 184-185; *Board of Trustees* v. *United States*, 289 U.S. 48, 56-60; *United States* v. *Mississippi*, 380 U.S. 128, 140-141; *Department of Employment* v. *United States*, 385 U.S. 355, 358.

This principle is not, as National League contends, a question of "legerdemain" to permit the federal government to avoid the Eleventh Amendment (N.L. Br., p. 121). The Eleventh Amendment's purpose was to reassert the States' sovereign position vis-a-vis individual citizens. Suit by the Secretary does nothing to affect the position of a State vis-a-vis its citizens. The States, however, have no similar claims of sovereign position vis-a-vis the federal government. As this Court stated in the *Mississippi* case, "nothing in [the Eleventh Amendment] or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States * * * with or without specific authorization from Congress * * *" (380 U.S. at 140).

It is immaterial that plaintiff is an official of the United States suing in its behalf rather than the United States in its own name. Suits brought by the Secretary of Labor to enforce the Fair Labor Standards Act have consistently been treated as suits by the United States.[48] Indeed, this Court recently recognized that the Constitution permits suits by the

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[48] *Mitchell* v. *McCarty*, 239 F.2d 721, 724 (C.A. 7); *Brennan* v. *State of Iowa*, 494 F.2d 100, 103; *Walling* v. *Norfolk Southern Ry. Co.*, 162 F.2d 95, 96 (C.A. 4); *Walling* v. *Frank Adam Electric Co.*, 163 F.2d 277, 283 (C.A. 8); *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 260 F.2d 929, 932 (C.A. 5), reversed on other grounds, 361 U.S. 288.

Secretary against States pursuant to the Act. In *Employees* v. *Missouri Public Health Department*, 411 U.S. 279, the Court held that Congress had not intended to permit individual employees to sue the State under Section 16(b), 29 U.S.C. 216(b). The Court observed, however, that this conclusion was consistent with the expanded application of the Act to State institutions through suits by the Secretary (411 U.S. at 285):

> By holding that Congress did not lift the sovereign immunity of the States under the FLSA, we do not make the extension of coverage to state employees meaningless. * * * [The Act] gives the Secretary of Labor authority to bring suit * * *. * * * [S]uits by the United States against a State are not barred by the Constitution. See *United States* v. *Mississippi*, 380 U.S. 128, 140-141.[49]

Cf. also, *National Labor Relations Board* v. *Nash-Finch Co.*, 404 U.S. 138, 145-146.

Although the relief sought by the Secretary may include a monetary benefit to underpaid employees, the Secretary nevertheless acts for the United States in bringing such suits. Cf. *Nathanson* v. *National Labor Relations Board*, 344 U.S. 25, 27. The pur-

[49] The concurring opinion also recognized that "suits brought in federal court by the United States against States are within the cognizance of the federal judicial power" (411 U.S. at 294, n. 9). And the dissenting opinion takes the position that there is no State immunity in Fair Labor Standards Act cases, whoever the plaintiff may be (411 U.S. at 298-299).

pose of the Secretary's suit is to vindicate the public interests declared in Section 2 of the Act, including the abatement of "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of the workers" and "conducive to labor disputes burdening and obstructing commerce." The "enforced payment" of wages withheld "is simply a part of a reasonable and effective means * * * to bring about general compliance with the [Act]" even though "as a result, money may pass from the employer into the pocket of the employee * * *." *Wirtz* v. *Jones*, 340 F.2d 901, 904 (C.A. 5). Cf. *United States Fidelity Co.* v. *Kenyon*, 204 U.S. 349, in which a suit was instituted by the United States for the benefit of a materialman on the bond of a contractor for a public work. In rejecting the contention that the materialman was the real party in interest, this Court said (204 U.S. at 357):

> * * * We repeat, the present action may fairly be regarded as one by the United States itself to enforce the specific obligation of the contractor to make prompt payment for labor and materials furnished to him in his work. There is, therefore a controversy here between the United States and the contractor in respect of that matter. The action is none the less by the Government as a litigant party, because only one of the persons who supplied labor or materials will get the benefit of the judgment. * * *

Edelman v. *Jordan*, 415 U.S. 651, upon which appellants rely, is not to the contrary. In *Edel-*

man, the Court held that the Eleventh Amendment was violated by a decree in a suit by a private citizen which ordered the State to make retroactive welfare payments. But the Court distinguished that case from the situation where suit is brought in behalf of the United States. The Court noted that the line of cases which "reaffirmed the principle that the Eleventh Amendment was no bar to a suit by the United States against a State" (415 U.S. at 669) was simply not applicable to suits by private citizens.

Moreover, the Eleventh Amendment does not foreclose a suit brought *in a State court*, whether by a private plaintiff or by the Secretary. In fact, such suits have been successfully brought by private plaintiffs. *Clover Bottom Hospital and School* v. *Townsend*, 513 S.W. 2d 505 (Sup. Ct. Tenn., appeal pending No. 74-487, filed Oct. 25, 1974); *Glick* v. *Montana*, 509 P.2d 1 (Sup. Ct. Mont.).

III

APPELLANTS' STATUTORY CONTENTIONS NEED NOT BE DECIDED NOW AND, IN ANY EVENT, ARE WITHOUT MERIT.

1. Appellant California makes the additional argument that, as a matter of statutory construction, it is not within the Act. As in *Maryland* v. *Wirtz*, *supra*, this case presents no occasion to decide "in the abstract and in general" whether particular public agencies are within the Act (392 U.S. at 201). The pleadings, motions, affidavits, and briefs in this case, as well as the decision of the district court, have

dealt with the broad contention that the extension of the Act to state employees generally is beyond congressional power. Questions of statutory construction, which necessarily depend upon factual questions not presented in this case, "may be considered as occasion requires" (392 U.S. at 201).

2. In any event, appellant's construction of the Act is incorrect.

a. Citing *Mitchell* v. *Zachry Co.*, 362 U.S. 310, appellant argues that Congress "did not imbue the [Fair Labor Standards] Act with its full power under the Commerce Clause," and that it specifically expressed a "concern *not* to impinge upon matters of local interest" (Cal. Br., p. 34). The *Zachry* case, however, was decided before the Act's original coverage provisions were broadened by the 1961, 1966 and 1974 Amendments to extend to employees who, although not themselves engaged in commerce or in the production of goods for commerce, are employed in an enterprise which has at least some employees engaged in such activities *or* in "handling * * * or otherwise working on goods *or materials* that have been moved in or produced for commerce" (29 U.S.C. 203(s); emphasis added).[50]

The result of those post-*Zachry* Amendments has been to extend the Act's coverage to employees of numerous local businesses, including schools (*Maryland* v. *Wirtz*, *supra*), building management companies (*Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S.

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[50] The words "or materials" were added by the 1974 Amendments. See discussion, *infra*, pp. 70-71.

512), apartment houses (*Brennan* v. *Dillion*, 483 F. 2d 1334 (C.A. 10)), private country clubs (*Shultz* v. *Deane-Hill Country Club, Inc.*, 310 F.Supp. 272, 277-278 (E.D. Tenn.), affirmed *per curiam*, 433 F.2d 1311 (C.A. 6), certiorari denied, 400 U.S. 820), and laundromats (*National Automatic Laundry & Cleaning Council* v. *Shultz*, 443 F.2d 689 (C.A. D.C.); *Wirtz* v. *Washeterias, S. A.*, 304 F.Supp. 624 (D. Canal Zone)).[51] As this Court explained the expanded coverage of the Act in *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516-517:

> The concept of "enterprise" under the Fair Labor Standards Act * * * substantially broadened the coverage of the Act. Rather than confining the protections of the Act to employees who were themselves "engaged in commerce or in the production of goods for commerce" [citations omitted], the new amendments brought those "employed in an enterprise engaged in commerce" within the ambit of the minimum wage and maximum hours provisions.

Thus, to be covered, an "enterprise" need not itself engage in the production of goods for commerce or perform any activities of a business nature (see pp. 29-30, n. 29, *supra*); it may receive, handle and con-

[51] The intent of Congress to cover such "matters of local interest" is clear not only from the statutory language, but also from the legislative history (S. Rep. No. 145, 87th Cong., 1st Sess., pp. 2-3, 76, 94-96; 107 Cong. Rec. 5964-5965), including, in particular, the rejection of an earlier bill which would have limited the Act's enterprise concept of coverage to establishments operating in two or more States (107 Cong. Rec. 5973, 6088-6089, 6243).

sume such goods. In this case, as the district court observed, "it is uncontested that the state and municipal institutions whose employees are reached for the first time by the 1974 Amendments do make substantial purchases in interstate commerce of equipment and other goods" (II App., p. 649).

2. Appellant contends that its "mere purchase" and subsequent handling of interstate goods is not sufficient to satisfy the Act's requirement that a covered enterprise have employees "handling * * * or otherwise working on goods that have been moved in * * * commerce," since the term "goods" is defined in the Act to exclude goods in the possession of the ultimate consumer (29 U.S.C. 203(s); Cal. Br., pp. 43-44).

This argument overlooks Section 6(a)(5)(E) of the Amendments (N.L. Br. App., p. 5a) which added a final sentence to Section 3(s)(5) of the Act providing that the "employees of an enterprise which is a public agency shall * * * be deemed to be employees engaged in commerce * * *."[52] It also ignores the fact that coverage also exists if the enterprise has at least some employees engaged in commerce or in the production of goods for commerce.[53]

[52] The addition of this language simply recognizes the obvious—*viz.*, that "the activities of government at all levels affect commerce" (S.Rep. No. 93-690, 93d Cong., 2d Sess., *supra*, at p. 24).

[53] Thus, regardless of any limitation on the definition of "goods," employees receiving purchases shipped interstate are "engaged in commerce" (*e.g.*, *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564) and employees engaged in the order-

Moreover, both the language and the legislative history of the 1961, 1966 and 1974 Amendments indicate that Congress never intended the term "goods," as used in Section 3(s), to exclude articles that are consumed in the operation of the employer's enterprise. This is shown by the frequently expressed intention to regulate the effect of substandard wage conditions on the interstate flow of goods (107 Cong. Rec. 6236; see H.Rep. No. 75, 87th Cong., 1st Sess., pp. 3, 8; S.Rep. No. 145, 87th Cong., 1st Sess., pp. 3-4; 107 Cong. Rec. 5841, 6234, 6236, 6240-6241); that flow of goods is no less substantial when the goods are consumed by the employer than when he otherwise disposes of them. That the term "goods" as used in Section 3(s) included goods which are consumed in the enterprise is indicated by the fact that, when Congress intended to refer to goods held for resale, it did so in those terms. Thus in 1961, in extending coverage to retail enterprises, Congress added the additional requirement that a retail enterprise purchase or receive "goods *for resale* that * * * have moved across State lines" in the annual gross volume of at least $250,000 (emphasis added). If the word "goods" excluded goods which remained with the enterprise, then the words "for resale"

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ing of such purchases and in other interstate communications or transmissions are "engaged in commerce or in the production of goods for commerce" (see, *e.g.*, *Public Building Authority of Birmingham* v. *Goldberg*, *supra*, and *Hodgson* v. *Travis-Edwards, Inc.*, 465 F.2d 1050 (C.A. 5), certiorari denied, 409 U.S. 1076).

would have been superfluous. See S.Rep. No. 145, 87th Cong., 1st Sess., *supra*, at p. 44.

But any possible doubt concerning the meaning of the word "goods" as originally used in Section 3(s) was dispelled by the 1974 Amendments, which inserted after the word "goods" the phrase "or materials," which phrase is not defined in the Act and thus is not restricted or limited by the exclusionary language of Section 3(i).[54] Congress' express pur-

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[54] Even the statutory definition of the term "goods" exempts from the exclusionary clause goods which are in the possession of an ultimate consumer who is a "producer, manufacturer, or processor" of such goods. Since the term "produc[ing]" is broadly defined in Section 3(j) (29 U.S.C. 203(j)) to include "handl[ing]," the exclusionary clause—by its own terms—does not apply to "goods" which are consumed in the operation of an enterprise. And, indeed, the courts of appeals, in construing the "handling" clause in Section 3(s), have uniformly found coverage where the employees of an enterprise handled goods that had moved in commerce even though such goods were necessarily consumed in the employer's operations: *Brennan* v. *Dillion*, 483 F.2d 1334 (C.A. 10) (an apartment house using out-of-State paints and cleaning equipment for maintenance purposes); *Brennan* v. *State of Iowa*, 494 F.2d 100 (C.A. 8), petition for a writ of certiorari pending, No. 73-1565 (schools and hospitals using out-of-State supplies and equipment for both housekeeping and therapeutic operations); *Wirtz* v. *Melos Construction Co.*, 408 F.2d 626 (C.A. 2) (a construction company using concrete made from out-of-State materials); *National Automatic Laundry & Cleaning Council* v. *Shultz*, *supra* (automatic laundries using out-of-State soaps and detergents); *Clifton D. Mayhew, Inc.* v. *Wirtz*, 413 F.2d 658 (C.A. 4) (a painting subcontractor using out-of-State paints and materials). See also *Shultz* v. *Union Trust Bank of St. Petersburg*, 297 F.Supp. 1274 (M.D. Fla.) (a nursing home using out-of-State soap, cleaning materials and linens); *Wirtz* v. *Washeterias, S. A.*, *supra* (a laundry using out-of-State detergents and bleaches).

pose for adding this phrase was "to make clear [its] intent to include within th[e] additional [handling] basis of coverage the handling of [interstate] goods consumed in the employer's business, as, *e.g.*, the soap used by a laundry" (S.Rep. No. 93-690, 93rd Cong. 2d Sess., *supra*, at p. 17).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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v.

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Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Continued)

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Legislative Materials:

1 *Annals of Congress* (1789) 60, 61

Constitution of the United States of America, Analysis and Interpretations, S. Doc. No. 82, 92d Cong., 2d Sess. XVIII (1972) 107

H.R. Rept. No. 1452, 75th Cong., 1st Sess. (1937) 114

H.R. Rept. No. 871, 89th Cong., 1st Sess. (1966) 114

H.R. Rept. No. 1366, 89th Cong., 2d Sess. (1966) 18

H.R. Rept. No. 913, 93d Cong., 2d Sess. (1974) .10, 12, 23-24, 39, 83, 122, 125, 130

H.R. Rept. No. 1280, 93d Cong., 2d Sess. (1974) 78

S. Rept. No. 884, 75th Cong., 1st Sess. (1937) 114

S. Rept. No. 911, 75th Cong., 1st Sess. (1937) 74

S. Rept. No. 1487, 89th Cong., 2d Sess. (1966) 18, 114

S. Rept. No. 300, 93d Cong., 1st Sess. (1973) .12, 22, 39, 122

S. Rept. No. 690, 93d Cong., 2d Sess. (1974) . 24, 87, 114, 130

Hearings on H.R. 7130 Before the Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 1st Sess. (1971) 20

Hearings on S. 1861 and S. 2259 Before the Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare, 92d Cong., 1st Sess. (1971) 20

Hearings on H.R. 12532, H.R. 7684, H.R. 9324 Before Special Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 2d Sess. (1972) 80-81

Hearings on H.R. 4757 and H.R. 2831 Before the Subcomm. on Labor of the House Comm. on Education and Labor, 93d Cong., 1st Sess. (1973) 18, 19, 21

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Hearings on S. 1861 and S. 1725 Before the Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare, 93d Cong., 1st Sess. (1973) 18, 19, 24

83 Cong. Rec. 7308 (1938) 16-17

83 Cong. Rec. 7391 (1938) 16

83 Cong. Rec. 7414 (1938) 16

119 Cong. Rec. H 7596 (daily ed. Sept. 6, 1973) 21

120 Cong. Rec. S 2516 (daily ed. Feb. 28, 1974) 21

121 Cong. Rec. H 133 (daily ed. Jan. 14, 1975) 77

Miscellaneous:

Advisory Commission on Intergovernmental Relations, *Trends in Fiscal Federalism* (1974) 80

America Burning: The Report of the National Commission on Fire Prevention and Control (1973) 84

Bureau of the Census, Social and Economic Statistics Administration, U.S. Dep't of Commerce, *Public Employment in 1973* (1974) 10, 27

Costo, *The Doctrinal Development of the Tenth Amendment*, 51 W. Va. L. Rev. 227 (1949) 55

Cowen, *What Is Left of the Tenth Amendment*, 39 No. Car. L. Rev. 154 (1961) 55

Elliott, *Debates on the Federal Constitution* (1836) . 47, 52, 60

Executive Office of the President, Circular No. 85-A (1971) 72

General Accounting Office, *Legal Limitations on Flexible and Compressed Work Schedules for Federal Employees* (1974) 88-89

Hart and Wechsler, *The Federal Courts and the Federal System* (1953) 53, 57, 77

Page

Labor-Management Services Administration, U.S. Dep't of Labor, *Summary of State Policy Regulations for Public Sector Labor Relations* (1974) 31

MacMahon, *Administering Federalism in a Democracy* (1972) 73

Madison, *Notes of Debates in the Federal Convention of 1789* (Norton ed. 1966) 40, 47, 52

National Governors' Conference, *Innovations in State Government* 91-92

Office of Management and Budget, *Catalog of Federal Domestic Assistance* (7th ed. 1974) 71

Rhyne, *Labor Unions and Municipal Law* (1946) 106

Schwartz, *The Bill of Rights: A Documentary History* (1971) 60, 61, 62

Smith, *The Convention and the Constitution* (St. Martins 1965) 52

Smith, *What Has Happened to the Tenth Amendment*, 10 La. Bar J. 21 (1962) 99

The Federalist (Mentor ed. 1961) 40, 42, 43, 47, 48, 50, 52, 53, 55, 89-90, 128-129

Warren, *The Making of the Constitution* (1928) .....

10 Weekly Compilation of Presidential Documents 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-878

NATIONAL LEAGUE OF CITIES, *et al.*,

Appellants,

v.

HON. PETER J. BRENNAN,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

This Case raises the question whether Public Law No. 93-259, 88 Stat. 55 (hereafter sometimes "1974 Amendments", amending the Fair Labor Standards Act (hereafter sometimes "Act"),[1] the Portal to Portal Act,[2]

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[1] c.676, 52 Stat. 1060, *as amended* 29 U.S.C. § 201 *et seq.* (1970)

[2] c.52, 61 Stat. 84, *as amended* 29 U.S.C. § 251 *et seq.* (1970). The statute of limitations provisions of § 6(d) of the Portal to Portal Act, 29 U.S.C. § 255(d), governing actions against States and political subdivisions under § 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b) are amended by § 6(d)(2)(A) of Public Law No. 93-259. This amendment responds to the decision of this Court in *Employees v. Missouri Dep't of Public Health*, 411 U.S. 279.

and the Age Discrimination in Employment Act,[3] to apply to all employees of States and their political subdivisions, are constitutional.[4] The questions presented involve whether our Federal system of Government as laid out in the entire Constitution is protected against subversion through a congressional claim that the entirety of each State Government and each local Government is an enterprise engaged in commerce or in the production of goods for commerce and can be regulated by the Federal Government by calling its governmental operation commerce. These questions have never been before this Court as now presented.[5]

[3]Pub. L. No. 90-202, 81 Stat. 602, 29 U.S.C. § 621 *et seq.* (1970). The definitions of "employer" and "employee" in §§ 11(b), 11(c) and 11(f) of the Age Discrimination in Employment Act, 29 U.S.C. §§ 630(b), 630(c), and 630(f) are amended by §§ 28(a)(2)-(4) of Public Law No. 93-259 to include States and political subdivisions of States.

[4]The effect on the system of constitutional Federalism of the amendment of each of these three acts is similar; State and City control of Government operation is usurped by including States and Cities within each Act. Because the fiscal impact is greatest from the amended Fair Labor Standards Act, that act (hereafter sometimes "Act") will be treated in detail. Appellants' constitutional objection applies to the amendment of all three acts.

[5]Other cases involving the collision between the Federal commerce power and constitutionally protected Federalism are pending before this Court in the cases of *Fry v. United States*, No. 73-822 (argued Nov. 11, 1974) and *California v. United States*, No. 74-739, *petition for certiorari filed*, 43 U.S.L.W. 3360, involving the Economic Stabilization Act of 1970; and *Iowa v. Brennan* No. 73-1565, *petition for certiorari filed*, 42 U.S.L.W. 3064, involving the 1966 amendments to the Fair Labor Standards Act.

This Case concerns the entire Constitution's scheme of Federalism, the basic constitutional sharing of Government power under our Federal system of Government, and whether the constitutional freedom of State Governments to carry out their internal governmental operations free from interference by the Federal Government occupies a higher protected status under the Constitution than any effect of the entirety of each State and local Government upon the "national free trade market" created by the Commerce Clause.

OPINION BELOW

The Order, Findings, and Opinion of the United States District Court for the District of Columbia, Civil Action 74-1812 (Dec. 31, 1974) (per curiam) is unreported but is included in the Appendix filed with this Court, App. 643-653.

JURISDICTION

This Suit was brought under 28 U.S.C. §§ 1331 and 1337 for injunctive and declaratory relief that all the 1974 Amendments to the Fair Labor Standards Act, Pub. L. No. 93-259, 88 Stat. 55, *amending* 29 U.S.C. §201 *et seq.* (1970), made applicable to States and Cities, violate the principles of our Federal system of Government created by the entire Constitution of the United States and particularly the Fifth, Tenth, and Eleventh Amendments to the Constitution and cannot

be rationally based on Art. I, §8, cl. 3 of the Constitution. This action was filed in the District Court on December 12, 1974. The District Court, having been constituted a Court of Three Judges, dismissed the Complaint and denied Plaintiffs' Application for a Preliminary Injunction on December 31, 1974. In its Order, the District Court stated it was acting under both Rule 12 and Rule 56, Federal Rules of Civil Procedure. (App. 652). On December 31, 1974, Plaintiffs noted their appeal in the District Court and applied to this Court for a stay. An injunction *pendente lite* was granted by the Chief Justice of the United States on December 31, 1974, and continued by this Court on January 13, 1975 on condition that the Jurisdictional Statement be filed by January 17, 1975. The companion case of *California v. Brennan*, No. 74-879, is an appeal by Plaintiff-Intervenor State of California from the same Order of the District Court below. The Jurisdictional Statement was timely filed, and an expedited briefing schedule agreed among counsel. The jurisdiction of this Court to review the District Court's Order by direct appeal is conferred by 28 U.S.C. § 1253.

QUESTIONS PRESENTED

1. Whether all State and local Governments are engaged in commerce among the States thus conferring constitutional power under the Commerce Clause upon the Federal Government to regulate wages, hours, and other terms and conditions of employment for all State and local Government employees.

2. Whether all State and local Government affects commerce among the States to an extent which confers constitutional power under the Commerce Clause upon the Federal Government to regulate wages, hours, and other terms and conditions of employment for all State and local Government employees.

3. Whether a Federal Act which usurps control of State and local essential Government services by increasing the cost of providing some services so greatly that these and other essential Government services must be altered or curtailed, and by conflicting with fair and valid State and local laws governing public employment and public debt, can have a rational basis under the Commerce Clause, where States and local Governments neither are in commerce nor provide essential Government services interstate.

4. Whether the careful balance struck between the Federal and the State Governments in the Constitution requires that a more direct impact on commerce be shown before the Commerce Clause can be used to rationalize an abrogation of the constitutional Federalism, in the form of a Federal preemption of control over the hours, wages and other terms and conditions of employment of State and local Government employees for the first time in 200 years, than the impact on commerce necessary to be shown to regulate private industrial functions.

5. Whether *Maryland v. Wirtz*, 392 U.S. 183, holding the Fair Labor Standards Act's "enterprise" concept to be constitutional under the Commerce Clause as applied to employees of those State-owned hospitals and schools which are in competition with private hospitals and schools is controlling precedent for

extension of that Act to all those State and local Government employees who are not engaged in such competition.

6. Whether the Due Process Clause of the Fifth Amendment is violated by applying to Government 691 pages of regulations promulgated to govern private industry, failing to recognize the unique political, economic and legal status of Government, and by issuing the only regulations particularly suited to Government (covering police and fire personnel), 39 Fed. Reg. 44141 (Dec. 20,1974), so few days before they were made effective as to make compliance impossible.

7. Whether the Eleventh Amendment is violated by a Federal Statute authorizing employee suits against States and local Governments in Federal Courts, including class actions, liquidated damages, counsel fees, and costs.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The entire Constitution of the United States, as amended, is involved in that Appellants rely upon all provisions creating the Federal system of Government.[6] Reference will be made particularly to:

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[6] There are 114 references to States in the Constitution. Other major constitutional provisions involving Federalism are:

Art. I, § 10: "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts;

Article I, Section 8:

"The Congress shall have Power***

* * *

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pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws:. . .

"No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into an Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

Art. IV, § 1: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Art. IV, § 2: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

"A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

"No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."

Art. VI: ". . .

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties

"To regulate Commerce *** among the several States ***;"

Article VI:

* * *

made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

"The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution;. . ."

AMEND. XIII: "§ 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"§ 2. Congress shall have power to enforce this article by appropriate legislation."

AMEND. XIV: "§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

AMEND. XV: "§ 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

AMEND. XIX: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. . . ."

AMEND. XXI: "§ 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

"§ 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by

"This Constitution, and the laws of the United States which shall be made in Pursuance thereof *** shall be the supreme Law of the Land ***."

Fifth Amendment:

"No person shall *** be deprived of life, liberty, or property, without due process of law;"

Tenth Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Eleventh Amendment:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Fair Labor Standards Amendments of 1974 are set forth in the Appendix to this Brief.

conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

AMEND. XXIV: "§ 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."

AMEND. XXVI: "§ 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

STATEMENT

This Case challenges the application of the Act to 11 million[7] State and City Government employees. By the 1974 Amendments, Congress declares it has power to legislate terms and conditions of employment for all Government employees, exempting some (such as supervisory employees) by grace. The Complaint in the District Court below set forth the State and City law and practice which would be pre-empted by the 1974 Amendments (Complaint ¶¶7-11, 16-19, 21-31, 35, 73-77; App. 10-15, 16-23, 25, 36-37).

City and State employees already receive more than the minimum wage under the Act, with minor exceptions; the average for Government employees is higher than in private industry. H. R. Rept. No. 913, 93d Cong., 2d Sess. 28-29 (1974). The areas of great increases in cost to Cities and States owing to the Act are for dual recordkeeping, new reports of City budgets (Pritchard Deposition at 33, App. 108), new Federal administrative procedures, and for overtime payments (Byrley Deposition at 64, App. 289-90). Cities and States must carry out their duties under what is left of State and local laws as well as their new, federally mandated duties. Mr. Pritchard and Mr. Byrley are experts on State and local Government. (See their resumes, Plaintiffs' Deposition Exhibit 1 and Defendant's Deposition Exhibit 39; App. 588, 566, respectively). They testified that the estimate of "billions" in

[7] In October, 1973, State and local Governments employed 11.4 million persons. PUBLIC EMPLOYMENT IN 1973 (U.S. Dep't of Commerce, 1973).

increased yearly costs is a fair and reasonable estimate (Complaint ¶44, App. 27-28) as applied to the 50 States, 18,000 Cities, 3,000 Counties and thousands of special districts created for such special functions as snow removal, sewage, drainage, and paving. (Pritchard Deposition at 89-90, Byrley Deposition at 20-21; App. 146-47, 260)

Paragraphs 45-72 of the Complaint (App. 28-36) and Defendant's Deposition Exhibits 1-36, 38, 40-48 (App. 311-566, 570-585) set forth for 10 States and 25 Cities the dollar impact of the 1974 Amendments; for these jurisdictions alone, and for the first year alone, the cost of Government operation will increase by an estimated $57 million. Paragraph 44 of the Complaint (App. 27-28) sets forth an estimate for the nationwide impact on fire personnel alone, for the first year alone: $200 million. (Letter from William F. Danielson, Director of Personnel, Sacramento, Cal., Dec. 24, 1974; App. 625). The increased costs for overtime, new Federal record keeping, new Federal administrative processes, and other burdens which produce no increase in governmental service is estimated to be in the "billions" for all State and local Governments. (Complaint ¶44, App. 27-28). The reliability of fire (and police) personnel costs as an indicator of the impact on all State and City Government employees lies with the "ripple effect" on all Government employment from these two areas. (Pritchard Deposition at 10, App. 92). Salaries for Government employees constitute 80 to 85% of City budgets. (Pritchard Deposition at 125-26, App. 170-71).

Under § 11(c) of the Act, 29 U.S.C. § 211(c), and regulations promulgated thereunder, 29 C.F.R. § 516.1, records must be kept and preserved by "every employer who is subject to any of the provisions of the Fair Labor Standards Act of 1938 as amended". Therefore,

records must be kept and preserved even with respect to those claiming exemption as bona fide executive, administrative or professional employees under 29 C.F.R. § 516.3. Similarly, records must be kept and preserved for employees subject to other miscellaneous exemptions under the Act, 29 C.F.R. §§ 516.11-516.33. This same principle would be applied to the intended police and fire overtime exemption and the police and fire regulations, 29 C.F.R. § 553.21. Failure to maintain and preserve the requisite records is itself a violation of the Act, 29 U.S.C. § 215(a)(5); whether or not certain employees may in fact be exempt, a covered employer is subject to the sanctions of 29 U.S.C. § 216 for failure to keep these records for all employees.

Governor Askew of Florida estimates (Defendant's Deposition Exhibit 43, App. 575) that the cost to Florida annually of this record-keeping alone will be $800,000. The Appellee states in the preamble to his Regulations of December 20, 1974 on tours of duty, wages, hours, compensable time in the counting of sleep and meal time, and other employment practices of fire and police for *overtime only* will cost States and Cities $27,500,000 in 1975. 29 C.F.R. § 553 (App. 596).

The Appellee, disputing the estimates of cost of the Complaint,[8] deposed Allen E. Pritchard, Jr. (App. 86),

[8] The Appellee herein cited the congressional finding, S. Rept. No. 300, 93d Cong., 2d Sess. 26 (1974), of a cost of the 1974 Amendments to States and Cities of $28 million the first year and $162 million the second year. As required by House Rule VII, the House estimated, H. Rept. No. 913, 93d Cong., 2d Sess. 41 (1974), a cost to the Federal Government of $250,000 for the first year of operation under the 1974 Amendments and $3 million for each of the next five fiscal years.

Executive Vice President of the National League of Cities (Appellant herein) and Charles A. Byrley (App. 246), Executive Director of the National Governors' Conference (Appellant herein) and introduced 47 exhibits (App. 311-565, 568-585) wherein States and Cities declared not only the bases for their estimates of fiscal dislocation owing to the 1974 Amendments, but also the damaging effect on the amount and quality of their Government services.

1. Legislative History of the Fair Labor Standards Act Through the 1974 Amendments.

Public Law No. 93-259 amends the Fair Labor Standards Act of 1938, 52 Stat. 1060, *as amended*, 29 U.S.C. § 201 *et seq.*; the Portal to Portal Act of 1947, 61 Stat. 84, 29 U.S.C. §§ 251-262; and the Age Discrimination in Employment Act of 1967, 81 Stat. 602, 29 U.S.C. §621 *et seq*. It was passed by Congress on March 28, 1974 and signed into law on April 8, 1974. Among other changes, Public Law No. 93-259 removed a long-standing exemption of State and local Government employees and included all Government employees within the coverage of the Act.[9] With the

[9] The following provisions from Public Law No. 93-259 apply to State and local Government employees:

§ 3(d). The definition of "employer" is amended to include a "public agency".

§ 3(e)(2). The definition of "employee" is amended to exclude in the cases where the employer is a State public agency, persons who are (1) not subject to a State's civil service laws and (2) publicly elected, or member of the

exception of police and fire personnel, the Act became effective against State and local Government employees

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personnel staff, or policy making appointee, or immediate legal advisor of one publicly elected.

§ 3(h). The definition of "industry" is amended to include "other activity" in addition to the original "trade, business or industry" language.

§ 3(r). The definition of "enterprise" is amended to include within the activities deemed to be performed for a business purpose, those activities performed by any person in connection with the activities of a public agency.

§ 3(s). The definition of "Enterprise engaged in commerce or in the production of goods for commerce" is amended to include an activity of a public agency and to state that "The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce."

§ 3(x). Subsection is added defining "public agency" as follows: "Public agency" means the Government of the United States; the Government of a State or political subdivision thereof; an agency of the United States (including the United States Postal Service and the Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency."

§ 6(b). Specific rates of compensation are provided for newly covered employees.

§ 7(k). Subsection is added creating a limited and diminishing exemption for police and fire protection employees (partially stated in § 13(b)(20)).

§ 13(b)(7). Phasing out the former overtime exception for public transit workers.

§ 16(b). Subsection is amended to grant State and local Government employees a cause of action against a public agency in "any federal or state court of competent jurisdiction."

§ 16(c). Subsection is amended to allow the Secretary to bring an action for both liquidated damages and back pay on behalf of an employee subject to certain conditions.

on May 1, 1974. Special amendments to § § 7 and 13 of the Act, 29 U.S.C. § § 207 and 213, exempted police and fire personnel from the Act's overtime provisions until January 1, 1975. On that date a series of replacement amendments were to have taken effect over a three year period to create a limited and diminishing exception from the Act's overtime provisions for police and fire personnel.

The Fair Labor Standards Act, as originally enacted, stated its findings in § 2(a):

> "The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. The Congress further finds that the employment of persons in domestic service in households affects commerce." c.676, § 2(a), 52 Stat. 1060, 29 U.S.C. § 202(a) (1970).

Section 2(b), 29 U.S.C. § 202(b), declares as the policy of the Act "to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power". The power conferred for congressional action there stated is the power "[t]o

regulate Commerce . . . among the Several States" U.S. Const., Art. I, § 8, cl. 3. "Commerce" is defined in § 3(b) of the Act as meaning:

> " . . . trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. § 203(b).

States, political subdivisions of States, and Cities were expressly excluded from the coverage of the Act by c. 676, § 3(d), 52 Stat. 1060.

An amendment from the floor of the House to remove the exclusion of employees of Government was rejected, 83 Cong. Rec. 7414 (1938), without extended debate.

In the House debate on the Act in 1938, a Member quoted, 83 Cong. Rec. 7391 (1938), from the President's special message to Congress of May 24, 1937:

> "Most fair labor standards as a practical matter require some differentiation between different industries and different localities."

Debate in the House touched on the sufficiency to invoke the coverage of the Act under the commerce power, of importation of goods which have travelled in interstate or international commerce:

> "MR. SEGER. What about the newspapers?
>
> "MR. HEALY. They would be exempt if they were involved in interstate commerce as to have any great effect.
>
> "Mr. SEGER. Would that be true despite the fact they import newsprint from Canada?

> "Mr. HEALY. I do not think it would have any effect on that at all.
>
> * * *
>
> "Mr. COX. If the purpose of the bill is to relieve the distressed condition of substandard workers, and if the lowest-paid workers today in this country are found in the fields of the farm and retail establishments, then why did the committee exempt these classes from the problem of the bill?
>
> "Mr. HEALY. I am sure the gentleman knows the answer: because that would exceed the powers of Congress. We are limited by the Constitution to business in interstate commerce." 83 Cong. Rec. 7308 (1938).

The Act was held constitutional as applied to business and industry in *United States v. Darby*, 312 U.S. 100.

Since its original enactment in 1938, the Act has been in a continuous state of alteration by way of amendments in 1940, 1949, 1955, 1956, 1961, 1963, 1966, 1972 and finally the 1974 Amendments here challenged. Generally, these amendments have extended coverage of the Act to a greater number of industries or employees thereof, increased the minimum wage, or created or eliminated exemptions from various provisions of the Act.

The 1961 amendments, while continuing the exemption of State and City employees, created the "enterprise" concept, covering not only employees personally engaged in commerce, but also any employee of an enterprise with employees engaged in commerce. 29 U.S.C. § § 203(r), 203(s) (1970), *amending* 29 U.S.C. § 203 (1958).

In 1966, the § 3(d) exemption was ended for State and City employees in hospitals, schools and transit

companies. The entire Act, including the "enterprise" concept, was made applicable to these Government entities. 29 U.S.C. §§ 203(d), 203(r), 203(s) (1970), *amending* 29 U.S.C. §§ 203(d), 203(r), 203(s) (1964). The rationale for this extended coverage is stated in the 1966 Committee Reports:

> "These enterprises [public schools and hospitals] which are not proprietary, that is, not operated for profit, are engaged in activities which are *in substantial competition* with similar activities carried on by enterprises organized for a business purpose." S. Rept. No. 1487, 89th Cong., 2d Sess., 2 U.S. Code Cong. and Ad. News 3010 (1966); H.R. Rept. No. 1366, 89th Cong., 2d Sess. 16 (1966) (emphasis added).

These amendments were upheld as applied to State hospital and school employees in competition with private employees engaged in such endeavors by a divided Court in *Maryland v. Wirtz*, 392 U.S. 183.

In 1973 and 1974 the Congress considered removing in full the exemption of State and City employees from the coverage of the Act.

The following labor unions spoke in favor of extension of the Fair Labor Standards Act to State and City Governments: the American Federation of Labor – Congress of Industrial Organizations (Statement of President)[10] (Statement of Director, Department of Legislation),[11] the Service Employees International

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[10] *Hearings on S. 1861 and S. 1725 Before the Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess., pt. 1 at 341, 351, 355 (1973). (hereafter, *Hearings - Senate* (1973)).

[11] *Hearings on H.R. 4757 and H.R. 2831 Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 91 (1973) (hereafter, *Hearings - House* (1973)).

Union (Statement of President),[12] the American Federation of State, County and Municipal Employees (Statement of President),[13] International Association of Fire Fighters (Statement of President)[14] (Statement of Legislative Representative),[15] and the International Conference of Police Associations (Statement of Vice President).[16]

Governments at all levels stated that the extension of the Act to States and Cities was both unnecessary and unconstitutional.

Specific comments were made by the following local Government officials in hearings before Congress on the proposed extension: National League of Cities (Letter of Executive Vice President)[17] (Statement of Director of Personnel, Sacramento, California)[18], United States Conference of Mayors (Letter from Executive Director)[19], twenty-nine individual Cities (Letters to Sen. Harrison Williams).[20]

Secretary of Labor Hodgson had earlier testified:

> "We cannot support this proposal [extension of coverage to state and local Government employees].

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[12] *Hearings - Senate*, pt. 2, at 13a (1973); *Hearings - House* 345 (1973).

[13] *Hearings - Senate*, pt. 2, at 24a (1973); *Hearings - House* 341 (1973).

[14] *Hearings - Senate*, pt. 2, at 40a (1973).

[15] *Hearings - House* 327 (1973).

[16] *Hearings - House* 287 (1973).

[17] *Hearings - Senate*, pt. 1, at 499 (1973).

[18] *Hearings - House* 148 (1973).

[19] *Hearings - House* 367 (1973).

[20] *Hearings - Senate*, pt. 2, at 255a-269a (1973).

In 1966, enterprise coverage was extended to hospitals, nursing homes, schools and institutions of higher learning regardless of whether they were public or private or operated for profit or not for profit. Here the Congress took the position that failure to cover all such institutions would have resulted in failure to implement one of the basic purposes of the act—the elimination of conditions which constitute an unfair method of competition in commerce.

"But extending coverage to all State and local employees is an entirely different matter. It would certainly involve the Federal Government in the regulation of the functions of State and local governments." *Hearings on H.R. 7130 Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. 552 (1971); *Hearings on S. 1861 & S. 2259 Before the Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess. 29 (1971).

Similarly, Secretary Brennan testified in 1973:

"I realize that the 1966 amendments extended enterprise coverage to employees of hospitals, nursing homes, schools and institutions of higher learning regardless of whether they were public or private or operated for profit or not for profit.

"The reason for the extension to this group of employees was that failure to cover all employees of such institutions would constitute an unfair method of competition in commerce.

"However, extension of coverage to all State and local government employees is too great an interference with State prerogatives.

"Impositions of the Federal standard for coverage, particularly for overtime, could have a

disruptive impact on many State civil service systems and the additional costs could overburden many small governmental units." *Hearings - House* 263 (1973).

In his veto of H.R. 7935, 93d Cong., 1st Sess., President Nixon said of the proposed Amendments to the Act:

"Extension of Federal minimum wage and overtime standards to State and local government employees is an unwarranted interference with State prerogatives and has been opposed by the Advisory Commission on Intergovernmental Relations." 119 Cong. Rec. H.7596 (daily ed. Sep. 6, 1973).

Likewise, in his letter of February 27, 1974, to Senator Harrison Williams, 120 Cong. Rec. S. 2516 (daily ed. Feb. 28, 1974) President Nixon recognized "the need for enacting a responsible minimum wage bill . . . ", but cautioned:

"The extension of the Federal minimum wage and overtime requirements to State and local government employees is also a problem. I appreciate the fact that the House bill under consideration tries to avoid undue interference in the operations of these governments by exempting police and firemen from the overtime requirements. However, I continue to agree with the Advisory Commission on Intergovernmental Relations that, in general, additional Federal requirements affecting the relationship between these governments and their employees is an unnecessary interference with their prerogatives. The available evidence has failed to convince me that these

governments are not acting responsibly in setting their wage and salary rates to meet local conditions. Additionally, if the Congress desires to make the minimum wage and overtime laws applicable to Federal employees, who are already adequately protected by other laws, it should place enforcement responsibility in the Civil Service Commission, which has the responsibility under the other laws."

The Senate Report on the Bill which became the 1974 Amendments (S. Rept. No. 300, 93d Cong., 1st Sess. 26 (1973), S. Rept. No. 690, 93d Cong., 2d Sess. 24 (1974)). stated:

"The Committee believes that there is no doubt that the activities of public sector employers affect interstate commerce and therefore that the Congress may regulate them pursuant to its power to regulate interstate commerce. Without question, the activities of government at all levels affect commerce. Governments purchase goods and services on the open market, they collect taxes and spend money for a variety of purposes. In addition, the salaries they pay their employees have an impact both on local economies and on the economy of the nation as a whole. The Committee finds that the volume of wages paid to government employees and the activities and magnitude of all levels of government have an effect on commerce as well."

Neither the House nor the Senate Committee Reports refers to the possibility of labor strife of an interstate nature between State and local Governments and their employees.

Furthermore, the legislative history contains no finding that labor disputes between public employees and local Governments have an impact on interstate

commerce, or that such employees are paid substandard wages.[21]

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[21] Appellee contends in his Motion to Affirm at 12-13 that:

"In considering the 1974 amendments Congress had before it evidence of the existence of substandard labor conditions in State and local governments. An estimated 409,000 State and local government employees were paid less than $1.90 an hour in 1973[9] - at a time when the proverty level income for an urban family of four was $4,540 or approximately $2.27 an hour."

Footnote 9 to the Motion states:

"The 409,000 figure is reached by adding to the 314,000 employees covered by the 1966 amendments, earning less than $1.80 an hour in September 1973, the 95,000 employees that Congress proposed to cover additionally when the minimum was raised to $1.90 an hour."

Such statistical argumentation ignores these facts. The 314,000 figure represents employees *already* covered by the FLSA under the 1966 amendments, not those brought under the 1974 coverage here challenged. The 314,000 figure cannot be considered as those receiving "substandard" wages according to any standard of the Act then in existence since those enumerated received a minimum wage of $1.60 an hour in compliance with the 1966 "standard". The 95,000 figure (less than 1% of those employees in State and local Government) attributed to 1974 coverage results from an "estimate" by the Department of Labor. H.R. Rept. No. 913, 93d Cong., 2d Sess. 28 (1974). Nowhere does the Report indicate the basis for this estimate of those who would be "benefitted by the impact of a $1.90 an hour minimum wage rate".

To the contrary, the House Report on the Act quotes a Department of Labor Report of 1970 that:

"wage levels for State and local government employees not covered by FLSA are, on the average, substantially higher than workers already covered." *Id.*

Arguing from this Labor Department Report's statement, the House Report continues:

The committee reports proposing the 1974 Amendments noted that the Secretary of Labor, reflecting the view of the Civil Service Commission,[22] opposed extending coverage of the Act to Federal employees because the legislation would "confuse the [Commission's] administration" of special pay provisions for Federal employees in Title 5, United States Code, and "could raise jurisdictional problems of administration." S. Rept. No. 690, 93d Cong., 2d Sess. 23 (1974); H.R. Rept. No. 913, 93d Cong., 2d Sess. 28 (1974). Accordingly, the committees resolved the matter by charging the Civil Service Commission, rather than the Department of Labor, with administration of the Act's coverage of Federal employees.

On March 28, the 1974 Amendments to the Fair Labor Standards Act were passed. In signing the 1974 Amendments with "some reservations" on April 8, 1974, President Nixon, at 10 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 391-92, said:

> "S. 2747 also extends coverage to include Federal, State, and local government employees, domestic workers, and others previously excluded from coverage. The Congress has reduced some of the economic and social disruptions this extension

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"The actual impact of a 40 hour standard would have been less because a substantial proportion of the employees receive premium overtime pay." *Id.* at 29.

The Committee concludes:

"The actual impact on State and local governments then, of a 40 hour standard, will be virtually non-existent." *Id.*

[22] *Hearings - Senate*, pt. 1 at 616 (1973).

> could cause by recognizing the unique requirements of police, fire, and correctional services. Similarly, within the Administration, we will do our utmost to administer the overlapping rules which will now apply to Federal overtime."

Newly covered State and City employees immediately come under the some 691 pages of regulations in Title 29, Code of Federal Regulations, Parts 500 to 899, although only 15% of these regulations apply to States and Cities (Pritchard Deposition at 121-123, App. 167-69). In addition, 29 C.F.R. Part 553 covering police and fire employees (including security personnel in correctional institutions) was to have gone into effect January 1, 1975. 39 Fed. Reg. 44141 (Dec. 20, 1974). The Regulations, Part 553, define fire protection and law enforcement activities (§§ 553.3 and 553.4), regulate joint employment situations (§ 553.9), require overtime compensation under "mutual aid" agreements (§ 553.10), define "tour of duty" (§ 553.13), prohibit the use of compensatory time off outside the work period (§ 553.19), and require the keeping of records for both "exempt" and "non-exempt" employees (§ 553.21). Police and fire personnel are precluded from using the ruling applicable to all other employees in 29 C.F.R. § 785.21, and are regulated rather by 29 C.F.R. § 553.15 which prohibits deduction (in computing time worked) of sleeping and eating time where a shift is exactly 24 hours long or less.

In governmental activities other than police and fire, no modifications in 29 C.F.R. Parts 500-899 have been proposed or contemplated to relieve State and local Governments from falling under regulations written for, and which for decades have been applied exclusively to,

private industry. As noted above, 85% of these prior regulations are admittedly inapplicable to State and local Government employees (Pritchard Deposition at 121-123, App. 167-69).

2. Judicial History of the Act Challenged As Applied to State and City Functions including *Maryland v. Wirtz*.

The 1966 amendments to the Act came before this Court in *Maryland v. Wirtz*, 392 U.S. 183. Neither the briefs nor the opinion in that case reflect a thorough consideration of the basic nature of constitutional Federalism. The basic scheme of the entirety of the Constitution as designed to provide an overriding protection for the shared governmental powers of Federal and State Governments, our Federal system of Government, was not weighed against the constitutional protection of a "national free trade market" embodied in the Commerce Clause. That State Governments are given a high constitutional protection of their functions as Governments, a higher rank than the Constitution's protection against small impacts upon commerce, was not considered. The whole concept of Federalism as embodied in the Constitution, and the constitutional distinctions between that which is governmental and that which is private commercial business, were not considered.

Factually, *Wirtz* did not consider an impact on State and City Governments of near the magnitude of the damage which the 1974 Amendments to the Act cause. This Court was not swayed by the impact of applying the Act to school and hospital employees. According to

the Bureau of the Census' report, PUBLIC EMPLOYMENT IN 1973, *supra* footnote 7, hospital employees constitute only 9.6% of full-time State and local Government employees. *Id.* at 3, Table C. Of these, the Act as reviewed in *Wirtz* exempted from coverage physicians, nurses, professionals and administrators. Pub. L. No. 87-30, § 9, 75 Stat. 71, *amending* 29 U.S.C. § 213(a)(1) (1958). Of the 49.6% of full-time State and local Government employees who are in education, PUBLIC EMPLOYMENT IN 1973 at 3 Table C, well over half are teachers, *Id.* at 9 Table 3, who were exempted from coverage by the Act reviewed in *Wirtz*, Pub. L. No. 89-601, § 214, 80 Stat. 833, 29 U.S.C. § 213(a)(1) (1964).

The Court in *Wirtz* decided only that a rational basis for application of the Fair Labor Standards Act "interstate enterprise concept" to State-owned schools and hospitals was shown by the following: (1) that "strife disrupting an enterprise involved in commerce may disrupt commerce", 392 U.S. at 192, and that schools and hospitals "are major users of goods imported from other states", 392 U.S. at 194, whose strikes "obviously interrupt and burden this flow of goods across state lines", 392 U.S. at 195; and (2) "that substandard labor conditions among any group of employees, whether or not they are personally engaged in commerce or production, may lead to strife disrupting an entire enterprise", 392 U.S. at 192. The Court did not consider Governments as Governments and the higher status of Governments under the Constitution.

The Court refused to decide:

> ". . . whether schools and hospitals have employees engaged in commerce or production. Such institu-

tions, as a whole, obviously purchase a vast range of out-of-state commodities. These are put to a wide variety of uses, presumably ranging from physical incorporation of building materials into hospital and school structures, to over-the-counter sale for cash to patients, visitors, students, and teachers. Whether particular institutions have employees handling goods in commerce, cf. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, may be considered as occasion requires." 392 U.S. at 201,

and it specifically limited its holding by stating:

"Congress has 'interfered with' these state functions only to the extent of providing that when a State employs people in performing such functions [operating State schools and hospitals] it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals." 392 U.S. at 193-194.

The Court did not treat Government operations as governmental and different from commerce.

Dissenting Justices Douglas and Stewart in *Wirtz* stated with respect to the commerce power:

"The immense scope of this constitutional power is demonstrated by the Court's approval in this case of regulation on the basis of the 'enterprise concept' – which is entirely proper when the regulated 'businesses' are not essential functions being carried on by the States.

Yet state government itself is an 'enterprise' with a very substantial effect on interstate commerce . . . If constitutional principles of federalism raise no limits to the commerce power where regulation of state activities are concerned, could Congress compel the States to build super-highways crisscrossing their territory in

order to accommodate interstate vehicles, . . . to quadruple their police forces in order to prevent commerce-crippling riots, etc.? Could the Congress virtually draw up each State's budget to avoid 'disruptive effect[s] . . . on commercial intercourse'? [citations omitted]." 392 U.S. at 204-205.

To this the majority responded:

"The Court has ample power to prevent what the appellants purport to fear, 'the utter destruction of the State as a sovereign political entity'." 392 U.S. at 196.

This statement was underlined by a strong and lengthy footnote, limiting the majority's decision:

"The dissent suggests that by use of an 'enterprise concept' such as that we have upheld here, Congress could under today's decision declare a whole state an 'enterprise' affecting commerce and take over its budgeting activities. This reflects, we think, a misreading of the Act, of *Wickard v. Filburn*, [317 U.S. 111] and of our decision.

* * *

"Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. The Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." 392 U.S. at 196 n. 27.

In *Employees v. Missouri Dep't of Health*, 411 U.S. 279, State-owned schools and hospitals were held immune from suits by employees in Federal Court

under § 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b). The Court, relying on *Wirtz* for the proposition that the employees of State institutions have "a relation to interstate commerce", concluded in dictum that when Congress acts in such situations to regulate, "it may place new or even enormous fiscal burdens on the States." 411 U.S. at 284. At the same time, the Court, 411 U.S. at 286, limited the right to sue States in Federal Courts to the Secretary with these words:

> "Recalcitrant private employers may be whipped into line in that manner. But we are reluctant to believe that Congress in pursuit of a harmonious federalism desired to treat the States so harshly. The policy of the Act so far as the States are concerned is wholly served by allowing the delicate federal-state relationship to be managed through the Secretary of Labor."

3. State and City Personnel Laws To Be Preempted By The 1974 Amendments.

Paragraphs 21-26 of the Complaint (App. 17-20) show State and local civil service and other personnel laws which will be superseded by the 1974 Amendments.

All States and Cities have laws covering employment of personnel and their working conditions which are separate and distinct from employees of private or business employees. These civil service and similar law provisions are quite detailed as to employment rights. Law provisions for administrative hearings generally also provide for Court Hearings. Most of the States have

collective bargaining laws applicable to public employees.[23]

The future of these State laws for public employees is clouded as it is apparent they will be eliminated in large part. Dual records for State purposes, dual processes, dual procedures and dual administrative and Court decisions will also be required to satisfy the new Federal Act and State and local law.

States and Cities seek to keep salaries on a par with industry and the Federal Government. (App. 193)

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[23]Of the fifty States and the District of Columbia, the following number authorize or permit collective bargaining by the following employees:

(1) Police – 40 States, of which 26 specifically authorize or permit such bargaining as to wages and hours.

(2) Firemen – 43 States, of which 30 specifically authorize or permit such bargaining as to wages and hours.

(3) Teachers – 43 States, of which 25 specifically authorize or permit such bargaining as to wages and hours.

(4) Other State or Local Employees – 41 States, of which 25 specifically authorize or permit such bargaining as to wages and hours. SUMMARY OF STATE POLICY REGULATIONS FOR PUBLIC SECTOR LABOR RELATIONS (United States Department of Labor, Labor-Management Services Administration, 1974).

Thus, at least 80% of the States authorize or permit collective bargaining by some or all of the above classes of employees. And at least 50% specifically authorize or permit such bargaining as to wages and hours. For the remainder of States with collective bargaining, bargaining on wages and hours may be assumed. C.f., § 9(a) of the National Labor Relations Act, Act of July 5, 1935, ch. 372, 49 Stat. 453, *as amended*, 29 U.S.C. § 159 (a) (1970), which explicitly mentions within the scope of bargaining only "wages, hours of employment", leaving unspecified the other "conditions of employment".

Collectively-bargained State and City personnel practices are, by their very nature, mutually agreeable to Government and to the employees of Government. The 1974 Amendments will supersede these State and local Government arrangements.

The 1974 Amendments conflict with, wipe out, or at least modify many State and local civil service and personnel laws, thereby creating a legal chaos unlike applicability of the Act to private business. Large penalty provisions apply to violators of the provisions of the Act and the regulations under the Act.

The degree to which this supersession, conflict, confusion and chaos may be accomplished, is shown by 29 C.F.R. § 553.2, (App. 600-02), which reserves to the Secretary's Administrator of Wages and Hours the final decision power to "determine the compensable hours of work, tours of duty and work period in applying the section 7(k) exemption."[24] The fiscal effect of this rigidity is shown, for example, by the effect on the State of Texas. State law in Texas requires a 365-day duty cycle for employees, including firemen; conformity with State law will preclude compliance with the 1974 Amendments' requirement that the § 7(k) provision for police and fire personnel is available only if tours of duty are between 7 and 28 days. The result is that adherence to State law lowers from 60 to 40 hours per week the level beyond which police and fire personnel in Texas must be paid overtime. (Pritchard Deposition at 137, 141; App. 179-80, 181-82). No longer will decisions be made locally or at State capitols on State and local personnel matters. Final decisions will come from the Administrator and Federal Courts, including this Court.

[24]Section 7(k) is added to the Act by the 1974 Amendments. Pub. L. No. 93-259, § 6(c)(1)(A), 88 Stat. 60, *amending* 29 U.S.C. § 207 (1970).

4. State and City Constitutional and Statutory Debt and Tax Limitations.

Paragraphs 73-77 of the Complaint (App. 36-37) set forth State constitutional debt and tax limitations which prevent deficit financing by Cities and States to meet increased costs mandated by the 1974 Amendments. As stated there, these increased costs must be met by curtailment of service levels, termination of services, or the foregoing of planned Government services. (Pritchard Deposition at 25, App. 102-03; Pritchard Deposition at 81, App. 140-41). The fear is very real that Congress, by imposing budget costs but not providing funds to pay those costs, will destroy the fiscal integrity of States and Cities.

If, as postulated by the Dissent in *Wirtz*, the commerce clause can be used as here to mandate costs upon States and Cities, their entire fiscal foundation will in fact be destroyed by the Congress. The effect of upholding congressional action nullifying these State and local debt and tax limitations upon State and local bonds is devastating. Municipal and State bonds are dependent upon State and local law binding the States and Cities, but there is no way States and Cities can bind the Congress or guarantee that a minimum wage power will not be used to mandate costs no State or City can afford.

5. State and City Estimates of Services and Personnel Practices Curtailed and Foregone Owing to the Fiscal Impact of the 1974 Amendments.

The Complaint sets forth decisions by States and Cities to alter and diminish Government services owing to the increased cost, imposed by the 1974 Amendments, of providing other Government services. The Act makes prohibitively costly certain personnel practices which had provided Cities and States needed flexibility and economies in providing Government services; among the practices adversely affected are: compensatory time off (Complaint ¶¶49,66; App. 29-30, 35), flexible scheduling practices (Complaint ¶49, App. 29-30), employment of student interns (Complaint ¶¶49,60; App. 29-30, 33-34), police and fire training (Complaint ¶¶56,69-70; App. 32, 35-36), availability of "reserve" policemen (Complaint ¶57, App. 32-33), and paid volunteers (Complaint ¶28, App. 21), institution of affirmative action programs (Complaint ¶59, App. 33), computation of payrolls (Complaint ¶63, 65; App. 34-35), membership on volunteer boards and commissioners (Complaint ¶65, App. 34-35), and joint employment (Complaint ¶¶29,46; App. 22, 29). These are illustrative, not exhaustive, as variety is a major fact and factor among State and local Governments, as they seek to adapt their resources to meet their varied needs. With the increased cost attendant to States' and Cities' inability, under the Act, to use these flexible and economical practices, States and Cities will have to curtail or forego some Government services.

In this case, an expert (see Plaintiffs' Deposition Exhibit 1, App. 588-90) in City administration testified that the 1974 Amendments would produce in Cities "a mass of confusion which is going to completely disrupt 200 years of stylized operations, which has been a tradition at the local government level." (Pritchard Deposition at 123, App. 169). He also said the Act caused great increases in costs and decreases in services. (Pritchard Deposition at 143, 151; App. 183, 189-90).

6. Order and Opinion of the District Court Below.

The Complaint, the Depositions of Messrs. Pritchard and Byrley, Deposition Exhibits consisting of letters and other documents from Governments of States and Cities, and other data of Record concerning the impact, in money spent, in services curtailed or foregone, in plans and procedures abandoned, in confusion and uncertainty, of the 1974 Amendments on State and City Government, was before the District Court below on the Appellee's Motion to Dismiss the Complaint, and Plaintiff Cities', States' and Government Organizations' Application for a Preliminary Injunction. The Court dismissed the Complaint and denied preliminary relief, making Rule 56, Fed. R. Civ. P., findings[25] as follows: that the State and City Governments before the Court are not seriously in competition with private industry (App. 650); that the impact of the 1974 Amendments may seriously affect the structuring of Government activities by reducing flexibility to adapt

to local and special circumstances (App. 650); and that States and Cities made substantial contentions that: (1) the 1974 Amendments will cause either an increase in local Government fiscal requirements or a reduction in services and personnel or both, (2) these results will obtain without any factual predicate showing that there has been in the past any substantial degree either of widespread labor unrest curtailing the flow of interstate commerce or of substandard wage scales, and (3) the 1974 Amendments will intrude upon State and City performance of essential Government functions far more than did those reviewed in *Maryland v. Wirtz*, 392 U.S. 183 (App. 651).

During the Hearing on the Motion to Dismiss and Application for Preliminary Injunction, one Member of the Court alluded, Tr., Dec. 30, 1974, at 36, to a higher-than-rational-basis test whether the 1974 Amendments are a valid enactment under the Commerce Clause, a test which was not applied in *Maryland v. Wirtz*. The Court, in its written findings and decision, expressly doubted some of the broad language of the majority in *Wirtz*. (App. 651).

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[25]The parties stipulated that the Depositions and Exhibits could be used for any purpose. Bryrley Deposition at 94, App. 309-10. They were introduced in evidence. Tr., Dec. 30, 1974, at 5, 6. The transcript of the Hearing of December 30, 1974 is not printed in the Appendix for Nos. 74-878 and 74-879, filed with this Brief.

SUMMARY OF ARGUMENT

I.

The Fair Labor Standards Act, by Amendments adopted in 1974, claims Congressional power to fix wages, hours, and other terms and conditions of employment for all State and local Government employees. Earlier regulation of salaries of State hospital and school employees remain a part of the Act. The Act actually reaches all State and local Government employees as new records are required to allow a Federal decision on those who are, by grace, exempted.

No prior Federal legislation has permeated the whole of State and local Government on such an intimate, internal, and important subject. No power "takeover" of this magnitude, operating directly on State and local Governments has ever been adopted before by the Congress.

States and local Governments, being bundles of law powers, must act through employees. Since this Act imposes regulatory controls which cover all their employees, this effectively intrudes the Federal Government into every function of every State and every local Government.

While the enormous costs of this intrusion are not a constitutional factor as such, these are a major fact flowing from the Act's provisions which overlap State and local law thus requiring dual records, dual reports, dual administrative processes, costly training of extra personnel, costly overtime, and new and expensive decisions. Employee actions are provided for in the Federal Courts for double time, penalties, attorney's

fees and class actions. Probable dual court jurisdiction is created over subject matter. The Act effectively eliminates volunteers now paid just enough to secure workman's compensation coverage or other benefits of local Government employment. Compensatory time off, joint employment, civil service provisions, and other unique State and local personnel plans designed to meet unique local needs at little cost must now be eliminated. This is done in large part through rigid uniform nation-wide rules under the Act which cause vast new costs by wiping out these unique and efficient low-cost arrangements.

That the Act imposes increased governmental costs directly on States and local Governments is not denied by Appellee. Appellee disputes Appellants' estimate of billions in costs, and tries to minimize costs, but he admits the costs are 27 millions of dollars for *overtime only* of police and fire fighters for the first year under the regulations he issued December 20, 1974.

The damaging fiscal impact of congressional mandating of great costs which breach State and local law on tax and debt limits is exceeded only by the fear and fact that such power in the Congress renders it legally impossible for States and Cities to give legally binding assurances to sell their bonds that tax and debt limits will not be exceeded in the future. They can bind themselves but not the Congress. Seemingly believing that a claim of *de minimis* impact would confer constitutional power, the House of Representatives passed the 1974 Amendments with a Committee finding that since States and local Governments have no substandard employment terms or conditions "The actual impact on State and local governments then of a

40 hour standard, will be virtually non-existent." H.R. Rept. No. 913, 93d Cong. 2d Sess., 28 n. 1 (1974).

The Senate Committee found a cost of $28,000,000 for the first year and $162,000,000 for the second year of applicability of the 1974 Amendments. S. Rept. No. 300, 93d Cong., 2d Sess., at 26.

II.

The major purpose of the Constitutional Convention of 1787 was to create a workable Federal system of Government. This Case involves all of that Federal system as embodied in the entirety of the Constitution of the United States.

The draftsmen of the Constitution made it clear in their explanations of that great charter that this governmental system of Federalism encompassed a sharing of governmental powers between the national Government and the State Governments. The plan envisioned full recognition and use of the State Governments then in being. The enumerated powers of the Federal Government were designed to do those national things the States could not adequately do. State Governments were subjected to specific prohibitions and requirements then apparent as needed to insure the operation of the Federal system of Government. This plan made it unnecessary to specifically enumerate the powers of the State Governments; that idea was not seriously considered. Even then, wide variety existed among the States in their Constitutional powers and laws as provided by their people.

Madison's NOTES OF DEBATE ON THE FEDERAL CONSTITUTION of 1787, the FEDERALIST Papers, and the ratification debates of the States make this basic Federalism concept clear beyond question. The Federal Government and the State Governments were often referred to, as "supreme" each within its own governmental area.

Hamilton articulated in FEDERALIST Paper No. 79 the view that this Court should strike down as unconstitutional any excessive assertions of power by the States or by the Federal Government. And Chief Justice Marshall embraced this implied power in *McCulloch v. Maryland*, 4 Wheat. 316, and as here, in many cases down through the years this Court is called upon to exercise that function.

A major purpose of the dual sharing of governmental powers under Federalism is to prevent centralization of power. This was a major part of the constitutional design.

This design is spelled out in the whole of the Constitution and the direct and implied restrictions there set forth even before the adoption of the Tenth Amendment. Down through the years the Federal and State Governments have built a wonderful record of cooperative Federalism and of comity and mutual respect for the governmental role of each other. Where taxes have been imposed on State Governments (*New York v. United States*, 326 U.S. 572 (with separate opinions)), or State [redacted] fees imposed on the Federal Government, (*Johnson v. Maryland*, 254 U.S. 51) this Court has invalidated these as violative of our Constitutional Federalism.

Here the Congress has by the 1974 Amendments overstepped constitutional Federalism by attempting to centralize power in itself to regulate the most intimate, internal and essential governmental function of States and local Governments of prescribing terms and conditions of employment of the employees of those Governments. As in *Kentucky v. Dennison*, 24 How. 66, 107-108, "such a power would place every state under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights."

Another purpose of the Constitution's framers was to create a national free market for commerce by preventing State-imposed trade barriers. The prohibitions of State import and export taxes and other constitutional prohibitions were designed to help do this as well as the Commerce Clause.

For the Congress to have usurped control of terms and conditions of employment of all State and local employees as "commerce" under the Commerce Clause in 1787 would have been denounced as [redacted] by the draftsmen and supporters of the Constitution. It still is. The Commerce Clause is for regulation by Government of commercial matters not governmental matters. Such has been the uniform interpretation and understanding. The issue in this Case is not whether the Federal or State Government can regulate industry but who regulates the State Governments themselves.

In adopting this Act in 1938 and in numerous acts regulating those in commerce, Congress has exempted States and Cities in recognition of their special governmental partnership status under Federalism. Other Federal legislation has recognized the unique

differences of State and local Government as Governments from private industry and applied exemption or different approaches of comity in recognition of Governments as Governments as in the recent Employees Retirement Income Security Act of 1974. The Social Security Act is optional insofar as State Governments are concerned.

Instances of cooperation, or Federal deference to State regulation of private industry such as cable television are collected in the Brief to illustrate cooperative constitutional Federalism in action. Federal programs cannot provide the experimentation, adaption and wholesomeness of local or regional variations.

Recognition of the special expertise and unique position of State Governments, especially State Courts, is seen constantly in the deference to State Courts by the abstention and related doctrines of this Court.

Up until now State and local Governments have had wide scope in adapting local resources to their peculiar needs but now such unique local concepts as volunteerism and compensatory time off in lieu of overtime pay, are to be wiped out and replaced by rigid nation-wide uniform rules centralized under Appellee. Thus will the great concept of constitutional Federalism be destroyed. To return to Chief Justice Marshall once more and *McCulloch v. Maryland*, he also said (at 4 Wheat. 403): "[N]o political dreamer was ever wild enough to think of breaking down the line which separates the states, and of compounding the American people into one common mass." Yet that is what the Congress has done here. Madison in FEDERALIST Paper No. 46 said "ambitious encroachments" by the

Federal Government on the authority of State Governments would be "madness"!

State and local Government power over the vital functions of Government, here usurped by Congress, is protected against such usurpation by the great purpose and principles of the concept of Federalism. The 1974 Amendments are unconstitutional as in violation of that purpose, those principles and that concept.

III.

Maryland v. Wirtz did not give major consideration to the historical roots or the vast development of constitutional Federalism and the legal and factual cooperative workings of our Federal system of Government. The major focus was on the new "enterprise" concept of the Act and commerce rather than on the power of the Congress to regulate State and local Governments as against the immunities provided by Federalism.

The majority's reply to the dissent in *Wirtz* was that the postulated congressional declaring of an entire State as a commercial enterprise, and the mandating of bankrupting costs upon the State, was an event that could not happen. This has proved to be wrong. It has occurred in the 1974 Amendments. The majority called this wrong speculation, a false interpretation of its opinion. Now that the speculation is fact, perhaps the majority does not interpret *Wirtz* as upholding the 1974 Amendments.

Maryland v. Wirtz did not consider the totality of our Federal system of Government as laid against a congressional scheme impinging upon every function of

every State and every local Government. A scheme which centralizes power in Appellee to impose high cost, rigid, nation-wide uniformity, wiping out small cost arrangements developed by experience to meet unique State and local needs. And this centralization is not mandated to wipe out substandard labor conditions as such conditions do not exist among States and local Governments. They pay fair and reasonable salaries, fix reasonable hours and have civil service, public sector collective bargaining and other laws insuring that their employees have terms and conditions of employment which meet public service needs while providing fair treatment.

The scheme of the 1974 Amendments thus has no basis in fact or in constitutional power. And since *Maryland v. Wirtz* supplies neither of these missing elements it is not controlling and the broad language which disturbed the lower Court in this Case should be restated or overruled.

Governmental variety, the great strength of cooperative Federalism, cannot constitutionally be wiped out by calling it commerce and conferring unprecedented pervasive power upon one partner to the Federal system to take over the vital and intimate function of employee terms and conditions of employment of the other.

The elaborate treatment of Government in the Constitution indicates an intent to make certain Governments, as Governments, receive a higher status which would not allow functions of those Governments to be classified as commerce.

Wirtz is bottomed on the assumption that the amendments of 1966 worked no real Federal interference with the Government of States (392 U.S. at 193).

To extend the *Wirtz* doctrine to justify this complete takeover, one must abandon the principle that a [redacted] basis for Federal legislation is more reluctantly found where to do so would force States and Cities to reduce or eliminate essential governmental service.

Admittedly, *Wirtz* condoned regulation of hospital and school employees competing with similar "enterprises" but without any firm analysis as to the ultimate impact on Federalism. In fact it appears to be denied by the exchange between the majority and dissent referred to above.

The focus of the Briefs and the majority opinion in *Wirtz* being on commerce, the threat that this initial Federal incursion presented to the integrity of constitutional Federalism received scant attention. Little, if any, analysis was given to the fundamental problem of preserving the careful governmental architecture of our Forefathers, while at the same time, giving proper recognition to the national free trade market embodied in the Commerce Clause. Given the absence of analysis, no balance was struck or attempted; and Federalism suffered at the hands of a legislative policy admittedly bottomed on a *de minimis* impact on commerce. The 1966 amendments' impact on State and local Government were, and are, not nearly as lethal as the potential governmental fiscal dislocation emanating from the 1974 Amendments.

As against the principles of our Federal system of Government, *Maryland v. Wirtz*, if interpreted to deny those principles, cannot stand. The programs and cooperative mutual respect of Federalism as sketched out in this Brief is not a picture of commerce in action but of Government in action.

IV.

The 1974 Amendments here challenged are bottomed on the Commerce Clause, which has been construed as a broad grant of power to the Congress to maintain and preserve a national free trade market, *Gibbons v. Ogden*, 9 Wheat. 1. Against this goal, this Court in considering challenged commerce legislation, has balanced the impact of the regulatory legislation in finding a rational basis for congressional action. *United States v. Carolene Products Co.*, 304 U.S. 144, 152. The "presumption" of constitutionality weakens as the legislation impacts a fundamentally protected right "within a specific prohibition of the Constitution, such as those of the first ten amendments. . .", *Carolene Products, supra*, 304 U.S. at 152 n. 4. This requirement of a higher-than-rational basis, commonly applied by this Court to legislation challenged on equal protection grounds, is as applicable to this challenge based on Fifth Amendment Due Process, See *Bolling v. Sharpe*, 347 U.S. 497, 499, especially here where the fundamental right of Federalism is preserved, not only in the Tenth Amendment, but in the 114 times throughout the Constitution's text where special provision is made for States. Private industry, the object of the Fair Labor Standards Act until the 1974 Amendments here challenged, depends on congressional grace when Congress acts rationally within the commerce power. The Constitution demands more for States and local Governments. *Polish Nat'l Alliance v. Labor Board*, 322 U.S. 643, 650 (dictum).

This Court has not been asked before to apply a higher-than-rational basis test to congressional legislation usurping State and City control of State and City Government; this was not done in *Maryland v. Wirtz*,

392 U.S. 183. But *Wirtz*, itself wrongly decided, is not this Case: this Case, for the first time before this Court, involves a congressional assertion of total power over the terms and conditions of employment of all Government employees, through whom States and Cities act for the people; these 1974 Amendments are an unconstitutional congressional assertion of power to control State and City Government itself.

V.

The Tenth Amendment did not create the Federal system of Government. The Constitution had already done that. The debates at the Constitutional Convention, the Constitution there produced, The Federalist papers, the debates at the State ratification Conventions all so establish.

The Federal system of Government is imbedded in the whole of the Constitution. To justify damage to that system, or violation of its principles designed to prevent centralization of the governmental functions of State and local Governments the Congress must enact legislation which meets a much higher constitutional standard than the traditional rational relation test.

Commerce in a national free trade market is important but so is our Federal system of Government. Protecting that system of Government is more important than protecting commerce, as that governmental system must in turn protect commerce. That system includes not only State powers and the People's [redacted] powers under the Tenth Amendment. It includes protecting Federal Government powers and not allowing the

system to break down by the excesses which Hamilton in the FEDERALIST said this Court would strike down as unconstitutional.

The Case for unconstitutionality is based on the whole of the governmental scheme of the Constitution, before the Tenth Amendment was adopted as well as the language of the Tenth Amendment. Certain it is that the Tenth Amendment is an important part of the Constitution which this Court must implement by enforcing its purposes which are to make clear that "absorption of legislative power by the United States over every activity", *Polish National Alliance v. Labor Board, supra*, 322 U.S. at 650 is a violation of the Constitution.

The 1974 Amendments do not meet the higher-than-rational test or even the traditional rational test. They violate not only Federalism, they violate the Tenth Amendment.

VI.

The 1974 Amendments here challenged went into effect against States and Cities on May 1, 1974; the effective date of provisions covering police and fire personnel was deferred to January 1, 1975. A reading of the 1974 Amendments makes clear that in them Congress asserts the power to control the terms and conditions of employment of all State and local Government employees, with minor exclusions. That certain exemptions are granted by congressional grace, as for supervisory personnel, in no way diminishes the congressional assertion of control over City and State

Government. C.f., the Internal Revenue Code of 1954, 26 U.S.C., and especially 26 U.S.C. §61.

Interpretation of exemptions from the coverage of the Act of either wages, or hours, or both, phrased very generally by Congress in amending the Fair Labor Standards Act many times, has been provided by regulations issued by Appellee and his Administrator of Wages and Hours. These regulations comprise 691 pages of a volume of Title 29 of the Code of Federal Regulations, and are admittedly 85% inapplicable to Government with its particularly stylized operation developed over 200 years of operation under our Federal system. Yet, with the exception of police and fire regulations, regulations designed for private industry were the only guidance for State and City Government to comply with this attempted congressional takeover of their Government functions.

Appellee on December 20, 1974, issued regulations of tours of duty, sleeping and eating time and overtime, which radically changed State and local law and traditional practices for police and fire fighters. The treatment in the regulations of sleeping and eating time, 29 C.F.R. §553.15, was not only in conflict with State and local law and practice but in conflict with congressional representations. These regulations were to go into effect January 1, 1975.

The regulations were issued by being printed in the Federal Register of December 20, 1974, which due to the Christmas holidays meant that actual receipt of that issue was some days later. This reduced the time for action under the regulations prior to their effective date to even less than the 6 business days provided on paper.

This meant that it was impossible for States and Cities to give notices required by law, assemble legislators and councilmen, and amend laws and budgets to bring them into compliance with the regulations. Such action made it impossible to comply with these regulations and rendered them void as in violation of due process.

VII.

As with the Tenth Amendment, the Eleventh Amendment did not create the Federal system of Government but rather recognized a system already guaranteed by the Constitution. Hamilton indicated in FEDERALIST Paper No. 81 that States as partners in Government would be immune from suits brought against them without their consent. When that principle was endangered by the decision in *Chisholm v. Georgia,* 2 Dall. 419, both the Federal and the State Governments cooperated to preserve the sovereignty of the States through the Eleventh Amendment.

The 1974 Fair Labor Standards Act Amendments represent a Federal fiat eliminating the Eleventh Amendment without the express or implied consent of the States. Of course, no express consent was offered by or obtained from the States. Furthermore, it would be ludicrous to twist any doctrine of implied consent to fit the present case by forcing a State to choose to discontinue employment of personnel or consent to suit. Nor should the doctrine allowing the Federal Government's suit against a State in vindication of a constitutional right be here distorted to allow the Federal Government's enforcement of a private citizen's private cause of action against a State in Federal Court.

ARGUMENT

1. The 1974 Amendments Conflict With Nearly Two Hundred Years of Federalism, Our Federal System Of Government, The Partnership of State and Federal Governments In Sharing Governmental Powers.

a. The Framers of the Constitution envisioned a Federal system of Government, a constitutionally protected partnership.

Since the 1974 Amendments here challenged are the Congress' first attempt ever to regulate the whole of an essential Government function, control of terms and conditions of employment, for all eleven million State and local Government employees, this Case involves all of our Federal system of Government as laid out in the Constitution of the United States. States and local Governments engage in a vast number of governmental functions from operating airports to public housing, police and fire protection, tax collection and zoning. In each instance, they act through employees who are reached by these 1974 Amendments. (Complaint ¶16, App. 16).

Here, as the Congress attempts to make this startling new takeover of a State and local Government essential governmental function – control of State and local Government employees – it seems most appropriate that we examine at least in broad historical perspective, our entire constitutional scheme, our entire dual-shared power concept, as applied to our Government system which is usually labelled "Federalism". Since this is a case of first impression, a revisit to

the views of the draftsmen of our Constitution is illuminating.

Any careful study of the genesis, creation and interpretation of the Constitution of the United States makes clear that its paramount purpose in the field of intergovernmental relations was to establish this dual or Federal system of Government. State Governments were in being and the Constitution's plan for Federal Government powers was drafted with this major fact in mind. This fact is clearly a major part of the design of the Constitution. The famous "Virginia Plan", "New Jersey Plan", "Connecticut Compromise", and in fact the substance of the debates and votes at the Constitutional Convention, as so carefully recorded by Madison, are irrefutable proof of this purpose.[26] The views of Hamilton, Madison and Jay in THE FEDERALIST papers furnish confirmation.[28] The State by State debates on ratification of the Constitution are further confirmation.[28]

And while the State debates are a massive presentation of an understanding that State governmental powers and the ultimate power of the People would be further protected by an amendment embodying the

[26]J. Madison, NOTES OF DEBATES ON THE FEDERAL CONVENTION OF 1787 (Norton ed. 1966); Warren, THE MAKING OF THE CONSTITUTION (1928); Smith, THE CONVENTION AND THE CONSTITUTION (St. Martins 1965)

[27]THE FEDERALIST (Mentor ed. 1961); In No. 39, Madison states: " . . . the new constitution will, if established, be a federal and not a national constitution."

[28]4 Elliott, DEBATES ON THE FEDERAL CONSTITUTION (1836) 177, 242, 244, 406, 545, 550, 625, 629.

principles of the Tenth Amendment, it is clear from the sources cited that even without such an amendment those who wrote the Constitution were unanimous in their view that the "Federalism" principles contained in the Constitution *prior* to and without the words of the Tenth Amendment guaranteed essential non-interference by either Federal or State Governments with the essential governmental powers of each. The decision here must therefore consider the whole of the Constitution to correctly evaluate the powers, functions, and cooperative "Federalism" thereby created.

Hamilton's view that this Court would strike down as unconstitutional any governmental excesses of power,[29] as enunciated later by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, was not seriously disputed. And while Hamilton's nationalistic stance and Madison's federalistic stance have provided grist for great constitutional debates to this day, no constitutional scholar of substance has ever denied that the Constitution created a Federal system of Government. Nor has anyone seriously denied this Court's umpire role in cases of power conflicts.[30]

And just as this Court's umpire role is implied from the whole of the scheme of the Constitution, so too is Federalism. The specific power authorizations to the Federal Government, the negative power prohibitions to the State Governments were all a part of the Constitution's Federalism design.

[29]THE FEDERALIST NO. 78 (A. Hamilton), *supra*, note 2, at 466-472.

[30]H.M. Hart and H. Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953).

The question presented here is not just one of protection of State governmental power as sloganized under the term "states' rights". The question here is one of protection of our Federal system of Government against the centralization of power the Constitution was designed to prevent. To reduce State and local Governments to the inferior status of reporting to and being governed by a Federal agency on such an important, ultimate internal matter as terms and conditions of employment of all employees is not envisioned by the Federal partnership system.

Here the Congress by these 1974 Amendments has overstepped constitutional bounds; its action violates both the spirit and the letter of the Constitution. It is this Court's duty so to hold and thus to preserve Federalism as envisioned and embodied in the Constitution by the Founding Fathers.

While the entire constitutional scheme is carefully laid out to insure Federalism as a system of Government, the Tenth Amendment is designed to protect the State Governments' traditional powers and the People's power as the ultimate primary source of all powers.[31] And while Federalism is not dependent upon the Tenth Amendment as Federalism was written into the design of the original Constitution, one cannot ignore the Tenth Amendment as a guarantee to the People and to the States of State governmental powers

[31]The 1974 Amendments here challenged usurp control of State and City Government from State and local officials responsible by election to the people; this power is given to unelected Federal employees responsible to no electorate.

or as a guarantee to the People of their paramount power.[32]

> "The federal and state governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes." THE FEDERALIST No. 46 (J. Madison).

It would serve no useful purpose to detail the some 114 references to the States in the Constitution and explain the importance of each. The decisions of this Court have done that repeatedly with respect to the major constitutional references to the States. We do cite cases in this Brief to establish that this Court has consistently recognized Federalism as a basic concept of our system of Government. Here this Court is called upon for the first time[33] to interpret what our Federal system of Government means when the Congress moves in to regulate and clamp controls on the entirety of State and local Governments as Governments. This is greatly different from cases where the Tenth Amendment was interposed (unsuccessfully of late) in a conflict where both State and Federal Governments sought to regulate commerce by some private industry or entity.

Under "Federalism" for example, Federal postal drivers have been held immune from State driver's license requirements, which was seen as a State attempt to regulate the Federal Government as a Government. *Johnson v. Maryland* 254 U.S. 51, 57, in *Miller v.*

[32]See Costo, *The Doctrinal Development of the Tenth Amendment,* 51 W. Va. L. Rev. 227 (1949); Cowen, *What Is Left of the Tenth Amendment* 39 No. Car. L. Rev. 154 (1961).

[33]See *supra* pages 26-30.

Arkansas, 352 U.S. 187 (per curiam) a State licensing requirement for control was similarly rejected. In both cases a presumption was raised that the Government interfered with was adequately performing its licensing and certification function, a function which would be "frustrated", *Miller*, 352 U.S. at 190, by intergovernmental interference.

In *Mayo v. United States*, 319 U.S. 441, 447, a State inspection fee was invalidated as applied to fertilizer shipment and sales by the United States; permissible taxes, such as on salaries of employees or purchases by suppliers were distinguished, the Court saying:

> "These inspection fees are laid directly upon the United States. They are money exactions the payment of which, if they are enforceable, would be required *before executing a function of government.*" (emphasis added).

In our Nation, Governments are bundles of law powers. Governments act only through their employees. One of their most vital internal and intimate governmental functions is, therefore, the terms and conditions of employment that they prescribe for their employees. "No more vital internal function of government exists for States and cities than control of their employees and the budget items relating to said employees." Complaint ¶36, App. 25) In fact, salaries of City employees make up 80 to 85% of each City budget. (Pritchard Deposition at 125-126, App. 170-71). States and local Governments now have fair and reasonable terms and conditions of employment for their employees designed *for their unique needs.* (Complaint ¶¶19, 21, App. 17). The Federal Government does not

possess all the knowledge, wisdom, fairness and reasonableness in the exercise of this essential governmental employment function for State and local Government.

The impact of these Amendments on intergovernmental relations is devastatingly enormous. As is made clear in the Complaint and Record herein, the 1974 Amendments wipe out State and local civil service, budget, debt and other laws in a way never contemplated by the Framers of the Constitution when they inserted the commerce power into that basic governmental charter.

State Governments free from Federal control are a paramount constitutional purpose, a purpose higher than any commerce impact they may make. Governments and the national free trade market envisioned by the Constitution were to coexist.

The 1974 Amendments fundamentally alter the distribution of governmental powers between the States and Federal Government thus destroying the very nature of our Federal system of Government by this usurpation through attempted Federal control over purely governmental organs and actions of State and local Governments.

In the decisions of this Court, one can trace most of the significant social, political and economic trends and developments of our Nation. Many of these cases have involved a decision whether the Federal or State Governments have power to act.[34] In the cases up to now the action so judged is largely regulation by Federal or State Governments of private persons or

[34] See Hart and Wechsler, *supra* note 30.

corporations.[35] Appellants urge that Government regulation of Government violates the constitutional principles of "Federalism" and is therefore unconstitutional.

This Act's 1974 Amendments are repugnant to the entirety of the Constitution of the United States. The Constitution enunciates a system of Government under which the Federal Government and the State Governments each perform Government functions appropriate to their assigned roles in our federalized system, with each Government respecting the role of the other and this Court acting as ultimate arbiter in case of conflict.

No act adopted by the Congress has ever before even attempted to directly control, regulate, take over or interfere with and impinge directly upon the whole of the employees and thus the whole of the governmental functions of State and local Governments *qua* Governments as substantially as do the 1974 Amendments here challenged.

The whole of State and local Government functions were not intended to be classified as commerce under any reasonable interpretation of the Commerce Clause of the Constitution which was inserted to enforce a national free market for trade. The Commerce Clause

[35]See, e.g., *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1943) (the steel industry); *United States v. Darby*, 312 U.S. 100 (the lumber industry); *Wickard v. Filburn*, 317 U.S. 111 (the wheat market); *United States v. Wrightwood Dairy*, 315 U.S. 110; *United States v. Carolene Products Co.*, 304 U.S. 144 (the dairy industry), *Heart of Atlanta Motel v. United States*, 379 U.S. 241; *Katzenbach v. McClung*, 379 U.S. 294 (public accommodations).

should not provide the Federal Government with a slick gimmick to take over and regulate State and local Governments.

In *Craig v. Missouri*, 4 Pet. 410, 433, the Court considered attempts by a State to issue money under the label of "bills of credit"; commenting on this perversion of word meaning, Chief Justice Marshall said:

> "Is the proposition to be maintained that the Constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the Constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing? We cannot think so."

And so here the adoption by the Congress of these 1974 Amendments where "Government" is called "commerce" so that the Federal Government may regulate State Government is "great and ruinous mischief" to evade the Constitution's failure to give power to the Federal Government to so regulate State Governments.

The 1974 Amendments have no rational basis in the Commerce Clause as properly defined in relation to Governments. The Constitution's Framers defined Government through many grants and prohibitions of power; they operated on assumptions based on State Governments in being.

"Federalism" looks to the entire Constitution as its constitutional basis. The Tenth Amendment is an additional and a specific bar to the takeover of State and local Government functions by the Federal

Government under the 1974 Amendments. The respect of the Congress for State governmental functions and powers has been so great throughout our Nation's history as to prevent any previous takeover legislation as pervasive as that here challenged. The constitutional mistake here made by the Congress in imposing this Act upon States is clear and must be corrected by this Court.

b. The first Congress memorialized a constitutionally protected partnership system between Federal and State Governments, in part through State powers specifically embodied in the Tenth Amendment, in addition to the other parts of the Constitution creating our Federal system of Government.

While the Federal system of Government is spelled out in the whole of the Constitution stating the Federal Government's part in that system and imposing certain restrictions on both the Federal Government and State Governments, a provision similar to the Tenth Amendment, reserving to the States those powers not delegated to the Federal Government, was recommended by all eight of the States which, in ratifying the Constitution, proposed various amendments.[36] In fact, a commitment to present such a provision as an Amendment was promised to secure ratification of the Constitution.[37] The provision which ultimately became the Tenth Amendment was included, therefore, in the first proposal of amendments to the Constitution, introduced in the House of Representatives by James

[36] 2 B. Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 983 (1971).

[37] *See* Schwartz, *Ibid*., and Elliott, *supra*, note 28.

Madison.[38] The proposed amendment stated, "The powers not delegated by this Constitution, nor prohibited by it to the States, are reserved to the States respectively."[39] This provision was retained by a select committee of the House chosen to consider and report on the amendments proposed by Madison and by the States.[40]

Debate on the amendment in the House of Representatives was brief. Twice, motions to add "expressly" before the word "delegated" were defeated.[41] James Madison, objecting to the changed wording, stated that "it was impossible to confine a Government to the exercise of express powers; there must necessarily be admitted powers by implication, unless the Constitution descended to account every minutiae."[42] Two other motions changing the wording of the amendment to that finally adopted were agreed to without debate,[43] and the proposed amendment was passed without further discussion.[44]

While the full Senate debates on the Bill of Rights are unreported, the Senate Journal shows that the Senate rejected a similar proposal to add the word "expressly" before "delegated".[45]

[38] 1 Annals of Cong. 436, 441 (1789).

[39] *Id*. 436.

[40] *Id*. 761.

[41] *Id*. 761, 767-68.

[42] *Id*. 761.

[43] *Id*. 761, 768.

[44] *Id*. 768.

[45] 2 Schwartz, *supra* note 36, at 1150-51.

The Bill of Rights was proposed and then approved by the First Congress on September 25, 1789, and ratified by three-fourths of the States on December 15, 1791.[46]

c. This Court has preserved the constitutionally protected Federal system of Government, of Federal and State partnership.

The basic pattern of Federalism, of Federal-State cooperative intergovernmental relationships, and shared governmental powers, is reflected in the decisions of this Court which consider the whole structure and dynamics of the State and Federal law systems in drawing lines of demarcation between Federal and State governmental powers.

As this Court said in *Ex parte Siebold*, 100 U.S. 371, 394, in upholding concurrent Federal-State regulation of elections:

> "The true interest of the people of this country requires that both the national and State governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution . . . "

This Court considered in *Ex parte Kentucky v. Dennison*, 24 How. 66, a Federal statute imposing a "duty" on State executives to extradite criminals. Construing the statute as permissive rather than mandatory, the Court said:

> "The Act does not provide any means to compel the execution of this duty, nor inflict any

[46] *Ibid.* 1165

> punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the government of the United States with this power. *Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights.* And we think it clear that the Federal Government, under the Constitution, has no power to impose on a state officer as such, any duty whatever, and compel him to perform it; for if it possessed this power, *it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State*, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State." 24 How. at 107-108 (emphasis added).

The 1974 Amendments overload the officers of each State and City with burdensome and expensive dual record-keeping and personnel scheduling chores mandated by those Amendments. These are in addition to State and City record keeping, personnel processing and other reporting. These federally ordered chores, to be used only to aid Federal usurpation of State and City personnel systems, violate constitutional Federalism.

In *Lane County v. Oregon*, 7 Wall. 71, a State statute requiring payment by a County to a State in coin (not in U.S. notes) was upheld, the Court saying:

> "Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with

powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved. The general condition was well expressed by Mr. Madison in the Federalist, thus: 'The Federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designated for different purposes'." 7 Wall. at 76.

The area in which this Court has most commonly been called upon to preserve the constitutionally protected Federal partnership is intergovernmental tax immunity. This Court has distinguished from areas of State activity which are federally taxable,[47] the immune functions "without which a state could not continue to exist as a governmental entity." *Helvering v. Gerhardt*, 304 U.S. 405, 418. C.f., *New York v. United States*, 326 U.S. 572, 582, and 326 U.S. at 588 (Stone, J., concurring).[48]

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[47]See, e.g., *South Carolina v. United States*, 199 U.S. 437, and *Ohio v. Helvering*, 292 U.S. 360 (liquor sales).

[48]That the majority opinion in *Maryland v. Wirtz*, 392 U.S. 183, could avoid mentioning the tax case of *New York v. United States* 326 U.S. 572, which the dissenting opinion found "echoed" in *Wirtz*, 392 U.S. at 202-203, is explained by the failure of this Court in *Wirtz* to distinguish the relative positions of the Federal and State Governments in regulating private industry, from the protected position of States in operating State Government itself. See page 123, *infra*.

In *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523-24, this Court said:

> "*But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers.* Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied nor extended as seriously to impair either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it." (emphasis added).

The cases of *Helvering v. Powers*, 293 U.S. 214, *Helvering v. Gerhardt*, 304 U.S. 405, and *Graves v. New York*, 306 U.S. 466, upheld Federal taxation of the salaries of employees of States or State-owned corporations. Each must be read in light of the finding of the effect of the tax there upheld on State Government operation.[49]

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[49]In *Alabama v. King & Boozer*, 314 U.S. 1, a State sales tax paid by a contractor was upheld against a claim of Federal immunity where the Federal Government had entered into a "cost plus" contract with the contractor and ultimately bore the incidence of the tax. The case turned on the question whether the Federal Government could be interpreted as the "purchaser" of lumber used in the construction within the State statute, the Court holding the Government was not the "purchaser". Therefore, the Court's statement, 314 U.S. at 8-9:

> "So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be

In *Powers*, the street railway, the salary of whose Trustees was held subject to Federal income taxation, was described by the Court as "intended to be self-sustaining . . . 'under such a flexible system of rate making as would allow the fixing of fares equal as nearly as might be to the cost of service.' The compensation of the trustees is undoubtedly a part of that cost." 293 U.S. at 223.

In *Gerhardt*, the Court found "that the present tax neither precludes nor threatens unreasonably to obstruct any function essential to the continued existence of the state government." 304 U.S. at 424.

In *Graves*, the Court made no finding that a tax (here a State tax of a Federal corporation) by one Government would have a deleterious effect on the operation of the other Government. The Court dealt in the abstract, with "assumptions" and "implied constitutional immunities". 304 U.S. at 486.

Furthermore, in these cases the assertion of immunity from Federal taxation involved a burden on Federal Government operation which is not present in the limitation of unconstitutional Federal interference by regulation. The Court in *Gerhardt, supra*, 304 U.S. at 421, said:

> "The effect of the immunity if allowed would be to relieve respondents [employees] of their duty of financial support to the national government in

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free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co. v. Knox*, [277 U.S. 218]; *Graves v. Texas Co.*, [298 U.S. 393], is dictum we think it no longer tenable."

> order to secure to the state a theoretical advantage so speculative in its character and measurement as to be insubstantial. A tax immunity devised for protection of the states as governmental entities cannot be pressed so far."

See also, *Helvering v. Powers*, 293 U.S. at 225.

This Court in *United States v. California*, 297 U.S. 175, 184, declared that State immunity from Federal taxation is "implied from the nature of our federal system. . . ."

In *United States v. Baltimore & O.R.R.*, 17 Wall. 322, 327-328, Federal imposition of tax on interest received by a City on railroad bonds was denied, a municipal corporation taking the immunity of the State from federal taxation. The Court there said:

> "The power of taxation by the Federal government upon the subjects and in the manner prescribed by the act we are considering is undoubted. There are, however, certain departments which are excepted from the general power. *The right of the states to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal government from its organization.* This carries with it an exemption of those agencies and instruments, from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted. Hence, the beginning of such taxation is not allowed on the one side, is not claimed on the other." (emphasis added).

See also *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 583-584.

The Court in *New York v. United States*, 326 U.S. 572, 576, said the Congress may not "do violence to the presuppositions derived from the fact that we are a Nation composed of States." The Justices of the Court continued in their separate opinions:

> "There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations.*** These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State." *Id.* at 582. (opinion of the Court by Frankfurter, J.).

> "All agree that not all of the former immunity is gone." *Id.* at 584 (Rutledge, J., concurring).

> "[A] federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government." *Id.* at 587 (Stone, C.J., concurring).

> "The notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system." *Id.* at 594 (Douglas, J., dissenting).

This analysis of constitutionally protected essential State governmental functions is as applicable to the commerce power as it was to the taxing power. In each instance a direct Government-on-Government burden is unconstitutional.

The Twenty-first Amendment, ratified after the Commerce Clause as was the Tenth Amendment, has been held to supersede the Commerce Clause, permitting State

license fees for the importation of alcoholic beverages, which before the Amendment "would obviously have been unconstitutional. . . ." *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 62. See also *Indianapolis Brewing Co. v. Liquor Control Comm.*, 305 U.S. 391, 394.

d. The Federal Government, even today, operates under this constitutionaliy protected Federal system partnership.

1) The Federal Government cooperates with, or defers to, State and City regulation of private industry.

Federalism – the shared governmental powers system of our Nation – requires many mutual accommodations, or comity, among Federal, State and local Governments with each Government performing that governmental service it can best perform.

The Federal Government has recognized the special expertise and the appropriateness of State and City regulations of matters of local concern. For example, in *Cable Television Report and Order*, 37 Fed. Reg. 3252 (Feb. 12, 1972) at ¶177, the Federal Communications Commission admits:

> "*Dual Jurisdiction*. The comments advance persuasive arguments against Federal licensing. We agree that conventional licensing would place an unmanageable burden on the Commission. Moreover, local governments are inescapably involved in the process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters, for

example, as how best to parcel large urban areas into cable districts. Local authorities are also in better position to follow up on service complaints. Under the circumstances, a deliberately structured dualism is indicated; the industry seems uniquely suited to this kind of creative federalism."

It is difficult to see a rational basis for the Congress' acting contrary to this policy in usurping, through the 1974 Amendments, State and local expertise in prescribing terms and conditions of employment of their own employees through whom States and Cities provide their essential Government services.

Federal-State cooperation was the method chosen by Congress, in the Social Security Act of 1935, Title IX, c. 531, 49 Stat. 620, to provide unemployment benefits; this was upheld in *Steward Machine Co. v. Davis*, 301 U.S. 548, 585; the same cooperative effort in the generation of electricity was upheld in *Alabama Power Co. v. Ickes*, 302 U.S. 464, 476-477 (" 'Each of the municipalities involved in this suit determined to enter into the electric distribution business of its own free will. There was no solicitation or coercion on the part of [the Federal Government] . . . ' ").

An amendment to the National Labor Relations Act provides that States may act in situations where the Labor Board declines to act for reasons of size or otherwise. Act of June 23, 1947, c. 120, 61 Stat. 146, 29 U.S.C. § 160(a) (1970).

The "Federal-State" amendments to the Atomic Energy Act allows the Atomic Energy Commission to enter into agreements with Governors of States to discontinue AEC regulatory powers over certain materials to protect health and safety from radiation

hazards. Section 1 of Pub. L. No. 86-373, 73 Stat. 688, 42 U.S.C. §2021 (1970).

Even concerning a congressional power so broad as the war power, this Court has rejected the argument that all power is in the Federal Government, favoring the view that "the constituted and constituting sovereignties must have power of cooperation against the enemies of all" *Gilbert v. Minnesota*, 254 U.S. 325, 329. See also, *Hamilton v. University of California*, 293 U.S. 245, 260.

Many other examples of cooperative Federalism could be cited,[50] but these illustrations indicate its enormous value and the damage which could flow from its destruction. There are hundreds of Federal programs (a few examples of such programs are found in the Catalog of Federal Domestic Assistance (7th ed., Ofc. of Mgmt. and Budget 1974)) which require participation by the States and their political subdivisions.

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[50]See, e.g., Section 15 of the Meat Inspection Act of 1967, Pub. L. No. 90-201, 81 Stat. 595, 21 U.S.C. §661 (1970); Sections 706(b) and 708 of Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 259, 42 U.S.C. §§2000e-5(c), 2000e-7 (1970); Section 6(c) of Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 107, 42 U.S.C. §2000e-8(b) (Supp. III 1973); Section 5 of the Wholesome Poultry Products Act of 1968, Pub. L. No. 90-492, 82 Stat. 796, 21 U.S.C. §454 (1970); Title V of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 88 Stat. 742, 30 U.S.C. §953 (1970); see also, the Federal Water Pollution Control Act, 33 U.S.C. §1151 *et seq*. (1970), as amended, 33 U.S.C. §1251 *et seq*. (Supp. III 1973); Clean Air Act, 42 U.S.C. §1857 (1970, as amended, Supp. III 1973); Occupational Safety and Health Act, 29 U.S.C. §651 *et seq*. (1970).

Until now the Federal Government has worked cooperatively to improve the status of State and local Government personnel.

Adoption of the National Intergovernmental Personnel Act (Pub. L. No. 91-648, 84 Stat. 1909, 5 U.S.C. §§ 1304, 3371-3376; 42 U.S.C. §§ 4701, 4702, 4711-4713, 4721-4728, 4741-4746, 4761-4772 (1970)) provided Federal technical and financial assistance in training State and local personnel to improve their merit systems. The United States Civil Service Commission may make grants up to 75% of training costs.

Cooperative Federalism has flourished in our Nation due to mutual respect of Governments. This cannot be if one Government is seeking to control an element as vital as personnel management of the other.

The Intergovernmental Cooperation Act of 1968, Pub. L. No. 90-577, 82 Stat. 1098, 42 U.S.C. § 4201 *et seq.* (1970), and the Advisory Commission on Intergovernmental Relations created in 1959, Pub. L. No. 86-380, 73 Stat. 703, 42 U.S.C. § 4271 *et seq.* (1970), provide the planning for enormous cooperative programs between the Federal, State and local Governments.

Numerous Executive Orders recognize the important governmental status of State and local Government. Circular No. 85-A issued by the Executive Office of the President on January 20, 1971 "to The Heads of Executive Departments and Establishments" mandates "Consultation With Heads of State and local Governments in developing of Federal Regulations" of interest to States and local Governments. In *New York v. O'Neill,* 359 U.S. 1, 6, this Court referred to

"increasing harmony within *the federalism created by the Constitution,*" (emphasis added), in upholding a voluntary agreement between States for attendance of witnesses at criminal trials. Reference was also made to "a constitutional division of powers." *Id.* at 10.

Cooperative programs carried out by Federal, State and local Governments have great value in considering the actual effect of the 1974 Amendments:

> "Testifying in 1966 before the Senate Committee on Governmental Operations, the then Director of the Budget, Charles L. Schultz mentioned that the preceding Congress had enacted twenty-one new health programs, seventeen new educational programs, fifteen new economic development programs, twelve new programs to meet city problems, four new programs for manpower training, and seventeen new resource development programs. These, he said, could have been shaped as direct operations of the central government, thus avoiding some difficult intergovernmental problems. But this course 'would not have led to effective solutions, since most of the problems which these programs attack are not the same nation-wide, and can only be solved in the context of widely different local conditions and requirements.' The soundness of this outlook is not denied by the fact that many national programs, when conducted wisely and with skill, can provide a good deal of experimenting and adaptation. On the whole, however, the case for acting indirectly through a variety of grants-in-aid is strengthened by the wholesomeness of local and regional variations as well as the frequent need for the collateral use of state governmental powers." A.W. MacMahon, ADMINISTERING FEDERALISM IN A DEMOCRACY 84-85 (1972).

Federalism has deepened the collaboration among levels of Government in the United States as grant-in-aid programs have grown.

These 1974 Amendments to the Act force State and local Governments into a uniform nation-wide mold.

In *United States v. Bekins*, 304 U.S. 27,54, the Court considered a bankruptcy statute passed to ameliorate the unconstitutionality of a former statute declared by the Court in *Ashton v. Water District*, 298 U.S. 513,530, to "materially restrict respondent's [political subdivision of a State] control over its fiscal affairs." In recognizing that such fiscal intrusion clearly would be unconstitutional, the Senate Committee on the Judiciary said in Senate Report No. 911, 75th Cong., 1st Sess., as the Court approved in *Bekins*, 304 U.S. at 51:

> "The bill here recommended for passage expressly *avoids any restriction on the powers of the States or their arms of government in the exercise of their sovereign rights and duties.* No interference with the fiscal or governmental affairs of a political subdivision is permitted. The taxing agency itself is the only instrumentality which can seek the benefits of the proposed legislation. No involuntary proceedings are allowable, and *no control or jurisdiction over that property and those revenues of the petitioning agency necessary for essential governmental purposes is conferred by the bill* . . ." (emphasis added).

The statute upheld in *Bekins* was carefully drafted to avoid involuntary fiscal disruption of States, political subdivisions and Cities. The 1974 Amendments challenged here will produce exactly that effect: "restriction on the . . . states . . . in the exercise of their sovereign rights and duties."

In other areas, the Federal Government has recognized States and Cities as better able to regulate certain aspects of private industry. This Court has construed the intent of Congress to facilitate the greater ability of States and Cities to regulate local matters.

The Court in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, applied this balancing test to an area in which Congress was silent (fire insurance):

> "[T]he primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case the competing demands of the state and national interests involved can be accommodated." 322 U.S. at 548.

Accord, *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 189; *California v. Thompson*, 313 U.S. 109, 114; *Parker v. Brown*, 317 U.S. 341, 362-363; *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 ("... the states may regulate matters which, because of their number and diversity, may never be adequately dealt with by Congress"); *United States v. Bass*, 404 U.S. 336, 349 ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *Heublein v. South Carolina Tax Comm'n*, 409 U.S. 275, 281-282; *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749; *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261, 275.

Even the Age Discrimination in Employment Act, applied to States and Cities by the 1974 Amendments here challenged, contains in § 14[51] provisions for

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[51] Pub. L. No. 90-202, 81 Stat. 602, 29 U.S.C. § 633 (1970).

Federal-State cooperation, which declare in relevant part:

> "(a) Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action."

Federal recognition of the special position of State Government in our constitutional scheme is especially pervasive in the jurisdiction of Federal Courts. Rate orders by State bodies are preserved generally from Federal injunction,[52] a recognition of State expertise over local matters. Federal Courts abstain from constitutional questions which could arise only under an interpretation of State law which has not yet been made by State Courts. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501; and Federal Courts grant injunctive or declaratory relief against State criminal prosecutions only in extraordinary circumstances. *Younger v. Harris*, 401 U.S. 37,41,49; *Samuels v. Mackell*, 401 U.S. 66, 69. Yet in the 1974 Amendments Congress has ignored State and City expertise and State and City law and decisions on terms and conditions of employment of their own Government employees as adapted to governmental needs and functions performed.

There are other areas of State action where the Federal Courts will not intervene such as probate of wills, administration of decedents' estates, divorce and intimate domestic relations like children's custody.

[52] 28 U.S.C. § 1342 (1970).

These are recognized as areas restricted exclusively to the State.[53]

2) The Federal Government, even more importantly, in recognition of the Federal system partnership, has exempted State and City Government from Federal regulations of private industry.

In recognition of their special status as Governments and the importance of preserving "Federalism", the Congress has exempted State and local Government from Federal regulations of private industry.

As was done in 1938 in the Fair Labor Standards Act,[54] Congress traditionally has written into labor and industrial legislation its recognition that Government is different from private industry and that State and City Government is not within regulatory reach of the Federal commerce power. The Social Security Act of 1935,[55] expressly exempts States, political subdivisions and their instrumentalities from Federal old age, survivors and disability insurance contributions. States and Cities are similarly exempted[56] from the National

[53] See Hart and Wechsler, *supra* note 30, at 1001-18.

[54] Section 3(d), 52 Stat. 1060.

[55] Sec. 811(b)(7), Act of August 14, 1935, c. 531, 49 Stat. 620, now 26 U.S.C. § 3121(b)(7) (1970).

[56] The Congress is presently considering usurpation of this area of State and City operation through amendment of the NLRA. H.R. 77, "A Bill to provide that employees of States and political subdivisions thereof shall be subject to the provisions of the National Labor Relations Act." introduced 121 Cong. Rec. H.13 (daily ed. Jan. 14, 1975).

Labor Relations Act,[57] and the Occupational Safety and Health Act.[58]

Other Federal legislation has expressly recognized the unique position of State and City Government, as not amenable to rules governing private industry. See, e.g., Section 3031 of the Employee Retirement Income Security Act of 1974;[59] see also H.R. Rept. No. 1280, 93d Cong., 2d Sess. 360 (1974) ("In studying whether the funding standards of the bill should be imposed on government [pension] plans, the study is to take into account the taxing power of the governmental unit maintaining the plan.")

Federal legislation has been construed by this Court not to treat State and City Government under rules applicable to private industry. Section 8 of the Sherman Act,[60] was so construed in *Parker v. Brown*, 317 U.S. 341, 351.

Section 308 of the Federal Regulation of Lobbying Act[61] exempts from registration requirements "any public official acting in his official capacity". The coverage of this regulatory act was found by this Court

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[57]Sec. 101, Act of June 23, 1947, c. 120, 61 Stat. 137, 29 U.S.C. § 152(2) (1970).

[58]Sec. 3(5), Act of December 29, 1970, Pub. L. No. 91-596, 84 Stat. 1591, 29 U.S.C. § 652(5) (1970).

[59]Pub. L. No. 93-406, 88 Stat. 829, 42 U.S.C.A. § 1231 (Supp. 1974).

[60]Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U.S.C. § 7 (1970).

[61]Act of Aug. 2, 1946, c. 753, 60 Stat. 841, 2 U.S.C. § 267 (1970).

in *United States v. Harriss*, 347 U.S. 612, 625, to be "special interest groups . . . masquerading as proponents of the public weal," clearly distinguishing States and Cities from private industry. The exemption of State and City public officials was recently declared to extend to full-time officers and full-time employees of organizations[62] of public officials who act solely on the authorization of a public official and who are paid from public funds. *Bradley v. Saxbe*, Civil Action No. 74-1327 (D.D.C. Dec. 18, 1974). Thus, employees of States and Cities are distinguished from employees of private industry, just as Federalism requires that States and Cities themselves acting in their capacities as Government be [redacted] from private industries.

Just as this Court has construed the intent of Congress in order to preserve Federalism concerning State regulation of private industry,[63] so this Court has construed the intent of Congress to preserve State immunity from Federal incursion. *Employees v. Missouri Dep't of Public Health*, 411 U.S. 279, 286.

e. Under this constitutionally protected Federal system partnership, States and Cities have fairly provided for wages and hours of employees in their Government operations.

As set forth in the Complaint, States and local Governments provide fair and reasonable terms and

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[62]National League of Cities, National Association of Counties, and United States Conference of Mayors.

[63]*United States v. South-Eastern Underwriters Ass'n, supra*, 322 U.S. at 548.

conditions of employment according to the unique needs of each Government, including fair and reasonable wages and hours. These personnel policies and employment terms and conditions include civil service and other laws to protect employment rights of state and city employees. (Complaint ¶¶19-35, App. 17-25).

The power to prescribe the terms and conditions of employment for its employees is vital to the performance of State and local governmental functions.

At least 80% of the States authorize or permit collective bargaining by some or all of the above classes of employees. And at least 50% specifically authorize or permit such bargaining as to wages and hours. For the remainder of States with collective bargaining, bargaining on wages and hours may be assumed. See *supra* footnote 23.

In light of Federal revenue sharing,[64] the Advisory Commisssion on Intergovernmental Relations emphasizes:

> "... the importance of improving the productivity and personnel practices of state and local governments. Though productivity and improvements at all levels are desirable, increasing productivity at the state and local level where direct use of resources is concentrated would have the greatest fiscal impact." ACIR, TRENDS IN FISCAL FEDERALISM 3(1974).

Secretary of Labor James Hodgson said in opposing the imposition of Federal control over State and City labor union relations, *Hearings on H.R. 12532, H.R.*

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[64]State and Local Fiscal Assistance Act of 1972, Title I, Pub. L. No. 92-512, 86 Stat. 919, 31 U.S.C. § 1221 *et seq*. (Supp. III 1973).

7684, H.R. 9324 Before Special Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 2d Sess. 281-83 (1972):

> "The States are taking advantage of this opportunity to adapt various public sector labor relations models to their local needs. The past six years has been a period of great activity in public sector labor relations at the State level. Not only have States developed various initial approaches to public sector labor relations, but they are refining and perfecting these approaches on the basis of their experience. For example, Wisconsin and New York have both amended their comprehensive statutes. Minnesota has replaced two 'meet and confer' laws with one collective bargaining statute. Connecticut is involved in a major legislative study of possible revision of its law. Thus, the States are not neglecting the problems of labor and management in the public sector. Rather than being detrimental as in the private sector, experimentation on a State-by-State basis in the public sector takes into account important State differences and contributes substantially to our understanding of the issues in public sector labor relations. This process of development should not be interrupted when there is no urgency for Federal legislation. Under these circumstances, variation rather than uniformity among the States is the more valuable pattern for policy development."

Across our Nation there are a wide variety of State and local governmental arrangements designed to provide maximum public services at the lowest public cost. Initiative in conception and execution, and *pro bono publico* volunteerism are trademarks of this variety. No people has developed *pro bono publico*

volunteerism more highly than at the local level in our Nation.

It is here where the impact of the 1974 Amendments causes the most damage. These Amendments force State and local Governments into a uniform nation-wide mold.

The history of State and local Government in this Nation has been one of flexibility, adaptation to change, and experimentation. Cities undergo cycles of growth and decline (Pritchard Deposition at 203-204, App. 224-25), requiring changes in personnel practices and adaptation of Government services. Cities experiment to obtain the most efficient and economical service. For example. Seattle trains its firefighters as building inspectors (Pritchard Deposition at 183-184, App. 211-12), a practice which will be penalized by the imposition of overtime under the "joint employment" regulation. 29 C.F.R. §553.9 (App. 608). Sunnyvale, California combines police and firefighters into public safety teams (Pritchard Deposition at 167, App. 200).

f. The Congress was aware of the variety of State and City governmental activity, under this Constitutionally protected Federal system of partnership; nevertheless the Congress usurped State and City control of their Government operation to force a uniformity foreign to our system of Federalism.

Two Secretaries of Labor have testified on the basis of a Labor Department study that States and Cities do not pay substandard wages. They opposed application of the Act to State and local Governments as an undue intrusion into their affairs. (See *supra*, pages 19-21). The

Advisory Commission on Intergovernmental Relations opposed the proposed legislation for the same reason. And the President of the United States vetoed Amendments similar to the 1974 Amendments for the same reason. See *supra*, page 21.

The legislative history, as already noted *supra*, does indicate that Congress had before it ample and competent evidence that extension of the Act to State and local Government employees was both unnecessary and in conflict with Federalism. House Report No. 913, 93d Cong., 2d Sess. 28 (1974) quotes a 1970 Department of Labor Study stating that "wage levels for State and local Government employees not covered by FLSA are, on the average, substantially higher than workers already covered" and that the "actual impact of a 40 hour standard would have been less because a substantial proportion of the employees receive premium overtime pay." Based on this Department of Labor Study, the House Report concluded that "the actual impact on State and local Governments then of a 40 hour standard, will be virtually non-existent," H.R Rept. No. 913, 93 Cong., 2d. Sess. 29 (1974)

All of these facts were known to the Congress, yet it adopted the Amendments again and the President reluctantly signed them as the vote in the House and Senate indicated no possibility that a veto would be upheld. Byrley testified however that the States had expected another veto. (Byrley Deposition at 57, App. 284).

Cities extensively use volunteers who are paid a nominal sum, generally to qualify for workman's

compensation (Complaint ¶28, App. 21). For example, some 1,000,000 volunteer firemen[65] will be greatly affected by the 1974 Amendments. The 1974 Amendments will impose on Governments, burdensome recordkeeping requirements (Pritchard Deposition at 10, App. 92), as well as the indecision attending the removal of decisions about volunteer status to the Appellee in Washington (Pritchard Deposition at 120, App. 167). If a "volunteer" is determined by the Appellee to be covered by the Act, he must be paid full compensation. (Pritchard Deposition at 119-120, App. 166-67). This spectre has forced Randolph, New Jersey, for example, to abolish this innovative and economical practice. (Complaint ¶65, App. 34-35) (See also Pritchard Deposition at 154-155, 167-171; App. 191-192, 200-03).

Some State and local Government personnel practices are so foreign to the industrial setting of the Act that they are not dealt with by regulation or existing case law. For example, State and local Governments "employ", as that term is described in §3(g) of the Act, 29 U.S.C. §203(g), people if they "suffer or permit" them to perform largely voluntary or civically motivated activities and compensate them by way of a small stipend or nominal amount to cover expenses. While the intended police and fire personnel regulations, 29 C.F.R. §553 (App. 591-620) deal with this area for

[65]"About 1 million Americans serve as volunteer firefighters, five times the number of paid firefighters in the Nation." AMERICA BURNING: THE REPORT OF THE NATIONAL COMMISSION ON FIRE PREVENTION AND CONTROL (1973). This Report concludes that it will cost local Governments 4.5 billion dollars annually to replace volunteers with paid firefighters.

public safety employees,[66] the subject is nowhere else treated for other Government employees. Under the Act, absent any interpretation by the Wage and Hour Division, State and local Governments must either entirely eliminate the nominal payments or pay the wage required by the Act. Local Governments who cannot afford to pay that wage must cancel the programs. This concept of "paid volunteers" is used by local Governments not only for firefighters and police, but also for employing poll workers in elections, and for implementing parks, recreation, and other Government projects for involvement of the young, elderly and disadvantaged in the community.

In like manner, 29 C.F.R. §791 regulates and severely restricts use of joint employment arrangements unless the employee is compensated at an overtime rate for hours worked over 40 in a workweek. Because of the variety of services which State and local Governments provide, many Government employees who augment their income by part-time jobs in other areas of the Government may now lose their second jobs because of the inability of their employer to pay the requisite overtime compensation for their second job. Whatever basis such requirements have in private industry is clearly inapplicable here, since State and local Governments may not readily pass added costs on to the "consumer" - their citizens, including their employees.

The traditional use of compensatory time off has

[66]For police and fire personnel, the Appellee's Administrator of Wages and Hours has already determined that payment averaging more than $2.50 per call precludes "volunteer" status. 29 C.F.R. §553.11 (App. 611).

allowed State and local Government employers to deal with the peak employment problems encountered by many of the duties thrust upon them. Unlike a corporation, Government is not free to perform or not perform these duties. It must perform them, and do so at the least cost to its citizens. Employees favor the concept of compensatory time off in that it gives them more freedom and flexibility in choosing time off and it gives them more time off. Because they are paid a regular amount each payday even when taking compensatory time off, they are "guaranteed" against seasonal layoffs. Compensatory time off beyond the workweek is prohibited under 29 C.F.R. §778.106 and must be discontinued if the Act is upheld.

The discontinuance of compensatory time-off and the requirement that overtime be paid will conflict with State law. For example, the Arizona Supreme Court in *State v. Boykin*, 109 Ariz. 289, 293, 508 P.2d 1151, 1155 (1973), declared that, while compensatory time off was constitutionally permissible for State and political subdivision Government employees, overtime could not be paid. (See Complaint ¶22, App. 18).

Compensatory time off is used extensively in State and City Government. For example, Salt Lake City accumulates 7000 hours annually for snow removal alone, which, under the 1974 Amendments must be paid for in cash as overtime. (Complaint ¶49, App. 29-30. Pritchard Deposition 61-70, 105; App. 126-133, 157-58).

The effect of this congressional disregard for the unique nature of State and City Government by the challenged 1974 Amendments will be tremendously adverse to the States and Cities, as well as to the

interest of the Federal Government in carrying out Federal-State cooperative programs.

Each State and local Government until now has had wide scope in deciding its governmental form and procedures to meet its peculiar needs. All kinds of nominally paid or purely volunteer Boards and Commissions have operated everything from airports to zoning. Now apparently, members of many of these Boards, if paid anything, must be paid at least the minimum wage and all kinds of records kept and reports filed with the Department of Labor.

From the sturdy New England towns to Western crossroads which became towns as the law became viable, vast individualistic volunteerism has kept Government costs and taxes low.

We could have, in principle, a perfect uniformity of law in the United States - at a price. We could have it by establishing a single legislature, a single system of courts, a single chief executive, and a single phalanx of executive departments and administrative agencies, each possessing within its sphere a nation-wide and general jurisdiction.

The Federal Government has avoided the rigidity which the Congress seeks to impose on States and Cities. The Civil Service Commission's objection to control by the Labor Department of Federal Government employees' terms and conditions of employment[67] was accepted in the 1974 Amendments;[68] implementa-

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[67]See S. Rept. No. 690, 93d Cong., 2d Sess. 23 (1974); H.R. Rep. No. 93-913, 93d Cong., 2d Sess. 28 (1974).

[68]Section 6(b) of Pub. L. No. 93-259, 88 Stat. 60, *amending* 29 U.S.C. § 204.

tion of the Fair Labor Standards Act coverage of Federal employees was committed to the Civil Service Commission.

The General Accounting Office, an agency of Congress, and the Civil Service Commission, charged with enforcement of some aspects of the 1974 Amendments, have concluded that this Act was wrongly enacted and should be amended. A recent GAO Report to Congress on LEGAL LIMITATIONS ON FLEXIBLE AND COMPRESSED WORK SCHEDULES FOR FEDERAL EMPLOYEES (B-179810, Oct. 21, 1974), indicates that while Defendant's Wage and Hour Division is acting to retard progress and diversity in flexible scheduling of both Federal and State and local employees, the Comptroller General feels that such flexibility increases morale and productivity and reduces absenteeism in Federal employees. In recommending that the Chairman of the Civil Service Commission "seek legislation to amend . . . FLSA, as amended, to permit testing of flexible and compressed work schedules", the Report conclusively states that:

> "Work schedules in the Government should be established on the basis of the needs and objectives of the work to be performed rather than on a predetermined and inflexible workday. . . . Those Federal activities which have piecemeal experimentation with altered schedules have. . . reported benefits. *In our opinion, altered schedules can be applied to selected Federal activities with resulting benefits to the Government, its employees, and the public.*
>
> "There have been no comprehensive tests of altered work schedules in the Federal Government. Current law limits the flexibility of Federal

> managers and employees to test new work schedules." (*Id.* at 17) (emphasis added).

The Congress in fact made no adequate study of the impact of the 1974 Amendments and seemingly acted largely upon the false representations of no impact. See *supra*, footnote 21.

Preventing the danger of centralization of Government which would destroy Federalism is the paramount purpose of the Constitution, and it was designed to prevent such centralization. Common sense and the instinct for freedom alike can be counted upon to tell the American people never to put all their eggs of hope for governmental problem-solving in one governmental basket. Such prevention is more important constitutionally than the prevention of slight governmental impacts on the concept of a free national trade market.

In *McCulloch v. Maryland*, Chief Justice Marshall said: "[N]o political dreamer was ever wild enough to think of breaking down the line which separates the States, and of compounding the American people into one common mass." 4 Wheat. 316, 403.

But dream they did in the 93d Congress, and the most egregious result (at least from the view point of constitutional Federalism) was the Amendments of 1974.

James Madison, for one, was convinced that a second American Revolution would inevitably erupt if the pressure for centralized power ever resulted in an attempt to usurp the sovereignty to be constitutionally guaranteed to the States, when he wrote in THE FEDERALIST, No. 46:

> "But ambitious encroachments by the federal government on the authority of the State

governments would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse a common cause. A correspondence would be opened. Plans of resistance would be concerted. But what degree of madness would ever drive the Federal Government to such an extremity?" *Id.* at 298.

Madness it may not be, but unconstitutional it is for the Congress to insist that upon the mere recital of an alleged, "magic" impact on commerce, it can than perforce regulate the terms and working conditions of virtually all Government employees. To suggest that the legislation is in derogation of constitutional Federalism is to be too mild; it does more than derogate, it abrogates the federal division of powers in the Constitution. The "common mass" envisioned by Chief Justice Marshall and the "madness" articulated by Madison are embodied in the 1974 Amendments.

There is no colorable argument that regulation of personnel practices – wages, hours, living, promotion practices – is not the single most vital, *internal* function of States and Cities. If there is individuality; if there is innovativeness; if the Governments closest to the people are to function as the "laboratories" of trial and error in democracy (first coined by Justice Brandeis in his dissenting opinion in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311; then, by definition, there must be control over the people hired to man them.

It is important that State and local Government employees look to their employing Governments rather than to Appellee in Washington to improve their employment terms and conditions.

Appellant National Governors' Conference recently published INNOVATIONS IN STATE GOVERNMENT, which contains descriptions by the Governors of their unique approaches to various problems high on the State's agenda. It is instructive to note that the very first article, by Governor Patrick J. Lucey of Wisconsin concerns "Increasing State Government Productivity." Governor Lucey writes:

> "If he [the Governor] is a good administrator, he may be able to widen that line-by improving the efficiency and productivity of government. In a time of increasing fiscal constraints on state government (and political constraints on raising taxes), achievement of his programmatic goals may depend on just such administrative success."

Governor Lucey then describes how he encouraged his employees to become innovative about ways and means of increasing their productivity:

> "Getting agencies to think about productivity was an essential first step to a state productivity policy. Next, working with the Department of Administration (our budget bureau), we decided upon a target figure for productivity improvement-2½ percent per year-a figure which is less than the average yearly productivity gain in the private sector. A memo was sent to all agencies of state government asking them to outline ways in which they would meet this figure for the first year of the 1973-75 biennial budget, and suggesting avenues of approach which they should explore. By setting a target figure and putting agencies on record as to how they would meet it, we made certain that they would do more than "think" about productivity. By giving them sufficient lead time and an active involvement in the planning

> process, we strengthened the possibility that they would become seriously committed to the goal itself."

How can a Governor conceivably initiate innovative progress designed to improve State Government productivity when the power to regulate state personnel practices-wages, hours, working conditions-resides somewhere in the labyrinthine bureaucracy of the Department of Labor? To control personnel is to control program; there can be no meaningful division of powers in the federal system if the National Government controls the terms and working conditions of employment for the "non-supervisory" employees of its supposedly sovereign "partners." The road to this centralization of power in the Federal capital is all too easy to travel; the road back, toward the Federal system envisioned in the Constitution would be difficult, if not impossible, if this Court embraces the Appellee's arguments on behalf of the Amendments of 1974.

g. Congressional regulation under the spending power is an admission that such governmental regulation of Government cannot be accomplished constitutionally under the Commerce Clause.

Federal regulation of States and Cities has been upheld under the spending power, Art. I, Sec. 8, cl. 1 of the Constitution. *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295; *Stearns v. Minnesota*, 179 U.S. 223, 232.

So, the objection of this Court in *United States v. Butler*, 297 U.S. 1, 64, and *Carter v. Carter Coal Co.*,

298 U.S. 238, 292, that Federal regulation could not proceed under the guise of the Spending Clause, was avoided by the Congress in using "strings" to force State compliance with the Federal social security and unemployment compensation scheme, a mechanism upheld in *Steward Machine Co. v. Davis*, 301 U.S. 548, 586. There, this Court characterized the Federal mechanism as "inducement", not "weapons of coercion, destroying or impairing the autonomy of the states." In *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 526, upholding a State act so "induced", the Court declared the essential feature of Federalism which the Fair Labor Standards Act Amendments at issue here contravene:

> "The United States and the State of Alabama are not alien governments. They coexist within the same territory. Unemployment within it is their common concern. Together the two statutes now before us embody a cooperative legislative effort by state and national governments, for carrying out a public purpose common to both, which neither could fully achieve without the cooperation of the other. The Constitution does not prohibit such cooperation."

This distinction between Federal contravention of State sovereignty under the spending power and Federal contravention of the Tenth Amendment was expressly made in *Oklahoma v. Civil Service Commission*, 330 U.S. 127, 143:

> "While the United States is not concerned and has no power to regulate local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to state[s] [redacted] shall be disbursed.

"The Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded *in this case.*" (emphasis added).

2. The 1974 Amendments, In Derogating The Constitution's Federal System Partnership, Must Pass A Higher-Than-Rational-Basis Test.

The effect of the Act is not limited to the fiscal and non-fiscal impact on State and City operations.

This Case involves power under the Constitution of the United States to regulate wages, hours and other personnel practices of more than 11,000,000 State and City employees.[69] From the adoption of the Constitu-

[69]Coverage of State and local employees under the Amendments is intended to be all-inclusive. Section 3 of the Act, 29 U.S.C. § 203, conclusively states that activities of a "public agency" (as defined in § 3(x), 29 U.S.C. § 203(x)) are activities performed for a business purpose, therefore making such activities those of an "enterprise" (as defined in § 3(r)) and that employees of an enterprise which is a public agency shall for purposes of subsection(s) be deemed to be employees of an "enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. § 203(r)(3). The Act's definition of "employee", 29 U.S.C. § 203(e)(1), excludes by grace from coverage only a narrow enclave of elected officials, immediate staffs and appointees, who to be excluded must also not be subject to State civil service laws. 29 U.S.C. § 203(e)(2)(C).

While the Act provides other exemptions such as those in 29 U.S.C. § 213 exempting professional, executive and administrative employees from the Act's minimum wage and maximum hours requirements (29 U.S.C. § § 206 and 207, but not § 206(d)), such exemptions in no way affect the applicability of other of the Act's requirements (such as recordkeeping) to these employees, and therefore in no way restrict coverage of the Act.

tion until 1974 this power to regulate terms and conditions of employment of their own employees was considered to reside in the States and their political subdivisions except, from 1966, for those hospital and school employees competing with similar "enterprises" as to be covered by the Act as upheld in *Maryland v. Wirtz*. As already stated, *supra*, States and Cities treat their employees fairly and reasonably as to terms and conditions of employment. William F. Danielson, Director of Personnel for Sacramento, California, has stated that the average salary of all firefighters is over $11,000 per year.[70] Studies by the Labor Department found that States and Cities pay higher salaries than the wages mandated by the Act. There is therefore no compelling governmental interest or reason for applying the Act to State and City employee terms and conditions of employment.

To follow *Wirtz* in this case would be to ignore the principle–which this Court in *Wirtz* did not consider, likely because of its finding, at 392 U.S. 193, of no Federal interference with the Governments of States, that a rational basis for Federal legislation is more reluctantly found where to do so would force the States and Cities to reduce or eliminate provision of essential Government service.

[70]Letter of William F. Danielson, December 24, 1974, citing to a survey conducted by the Equal Employment Opportunity Commission in October, 1973. (App. 625-38).

a. Not the rational basis test, but a higher test, must be applied where Federal legislation contravenes a fundamentally protected constitutional right.

State legislation is more carefully scrutinized[71] under the Fourteenth Amendment when it interferes with an expressly stated constitutional right such as freedom of speech. So also must Federal legislation be more carefully scrutinized under the Fifth Amendment standard of rationality when it interferes with rights and powers expressly stated for States and the People to preserve their parts in Federalism under the Tenth Amendment. As to application of the Fifth Amendment to the Commerce Clause of the Constitution, see

[71] This higher-than-rational basis test has been phrased as "carefully and meticulously scrutinized", *Reynolds v. Sims*, 377 U.S. 533, 562; "that States may not casually deprive", *Carrington v. Rash*, 380 U.S. 89, 96; "the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms . . .", *Thomas v. Collins*, 323 U.S. 516, 530; "strict scrutiny", *Skinner v. Oklahoma*, 316 U.S. 535, 541; "compelling governmental interest", *Dunn v. Blumstein*, 405 U.S. 330, 342. See also, *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670; *Thornhill v. Alabama*, 310 U.S. 88, 95-96, 104; *Meyer v. Nebraska*, 262 U.S. 390, 399-400; *Schneider v. Irvington*, 308 U.S. 147, 161; *Bates v. Little Rock*, 361 U.S. 516, 524; *Gibson v. Florida Investigation Committee*, 372 U.S. 539, 546; *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627; *NAACP v. Alabama*, 357 U.S. 449, 463; *NAACP v. Button*, 371 U.S. 415, 438-439; *Roe v. Wade*, 410 U.S. 113, 155; *Shapiro v. Thompson*, 394 U.S. 618, 641; *Sherbert v. Verner*, 374 U.S. 398, 406; *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (Frankfurter, J., concurring); *Williams v. Rhodes*, 393 U.S. 23, 31.

McCray v. United States, 195 U.S. 27; *Scranton v. Wheeler*, 179 U.S. 141.

A test higher than the general rule of review by this Court of Federal legislation, the rule of seeking a "rational basis" for Federal regulation of private industry,[72] must be applied in this case. This exception requires that Federal legislation contravening fundamentally protected rights[73] be supported by more than a rational basis as was adumbrated in *United States v. Carolene Products Co.*, 304 U.S. 144:

> "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." 304 U.S. at 152 n. 4.

This Court has recommended that "Congress is free to apply the same principle in the exercise of its powers." *Katzenbach v. Morgan*, 384 U.S. 641, 654 n.15. See also, *State Board of Education v. Barnette*, 319 U.S. 624, 638-639:

[72] ". . . regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *United States v. Carolene Products Co.*, 304 U.S. 144, 152.

[73] Neither the concepts of strict scrutiny nor of fundamental rights under the Equal Protection clause are foreign to judicial review of Federal legislation. *Dennis v. United States*, 341 U.S. 494, 508-509; *Bolling v. Sharpe*, 347 U.S. 497, 499; *Shapiro v. Thompson*, 394 U.S. 618, 641.

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. ***The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. *But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds*. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case." 319 U.S. at 638-639. (emphasis added)

b. The governmental powers of the States are a fundamentally protected constitutional right embodied in the Tenth Amendment.

Mr. Justice Jackson has been quoted as saying of the Tenth Amendment:

> "I know that it is now regarded as more or less provincial and reactionary to cite the Tenth Amendment, . . . That Amendment is rarely mentioned in judicial opinions, rarely cited in argument. But our forefathers made it a part of the Bill of Rights in order to retain in the localities certain powers and not to allow them to drift into centralized hands. Perhaps the Tenth Amendment is drifting into oblivion . . . ".[74]

But the Tenth Amendment is not to be shorn of its meaning by narrow and technical construction. It must not be consigned by this Court to oblivion. It must be considered fairly and liberally so as to give effect to its scope and meaning. And a major reason is that the guarantees embodied in the Tenth Amendment are a fundamentally protected constitutional right.[75] When the issue is a conflict between State and Federal regulation of a given economic enterprise, and Congress has either explicitly or by construction dealt with the area, such regulation pre-empts that of an individual State. However, when the subject regulated is no longer an economic enterprise but the State Government itself, there exists no precedent for Federal regulation and "the implications of our dual system of Government" cannot thereby be destroyed.

To use whatever impact States may have upon commerce as an excuse for the total restructuring of State budgetary activities and priorities by Federal regulation has been rejected even by the majority in *Wirtz*. This violation of our constitutional Federalism

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[74]Smith, *What Has Happened To The Tenth Amendment*, 10 La. Bar J. 21 (1962).

[75]Constitutional expression of a fundamental right will require the higher than rational basis test, whereas other interests not expressly or impliedly protected in the Constitution itself may be contravened upon a showing of a rational basis. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 30, 35 (education).

has no precedent in the history of the Constitution and has no rational basis today.

In *Polish Nat'l Alliance v. Labor Board*, 322 U.S. 643, 650, the Court said by way of dictum:

> "The interpenetrations of modern society have not wiped out state lines. It is not for us to make in-roads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity." 322 U.S. at 650.

In *Wilson v. North Carolina ex rel. Caldwell*, 169 U.S. 586, 594, the Court held that a State Governor's suspension of a railroad commissioner would not be inquired into by Federal Courts except on deprivation of "one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen. . . ."

The same policy of noninterference with State Government administration must be applied against the Congress as against the Courts.

And in *Kotch v. River Port Pilot Comm'rs*, 330 U.S. 552, 557 the Court upheld against challenge on equal protection grounds a State law requiring that maritime pilots be qualified State officers. The Court said:

> "[A]n important factor in our consideration is that this case tests the right and power of a state to select its own agents and officers. [citing cases]."

The Court stated in *Taylor v. Beckham*, 178 U.S. 548, 570-571, the principle that:

> "It is obviously essential to the independence of the states, and to their peace and tranquility, that their power to prescribe the qualification of their own officers, the tenure of their offices, the manner of their election, and the grounds on which, the tribunals before which, and the mode in which, such elections may be contested, should be exclusive and free from external interference, except so far as plainly provided by the Constitution of the United States."

This principle is equally applicable to the right and power of States and their political subdivisions to regulate the employment of all employees of State and local Governments, who are the agents and servants of State and local officers.[76]

On the specific point of this Case, the Court in *Newton v. Comm'rs*, 100 U.S. 548, 559, said:

> "The legislative power of a State, except so far as restrained by its own Constitution, is at all

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[76]The independence of States and the State and local officers, which is provided in our constitutional Federalism, can only be preserved by preserving from Federal incursion State judgments about the use of servants and agents in providing essential Government services.

In *Gravel v. United States*, 408 U.S. 606, 616-617, a case determining, *inter alia*, the extent to which a servant and agent of a United States Senator takes the legislative privilege of the Senator, the Court said:

> "that it is literally impossible, in view of the complexities of the modern legislative process . . . for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they *must be treated as the latter's alter ego.*" 408 U.S. at 616-17. (emphasis added).

times absolute with respect to all offices within its reach. It may at pleasure create or abolish them or modify their duties. It may also shorten or lengthen the term of service. And it may increase or diminish the salary or change the mode of compensation. Butler v. Pennsylvania, 10 How., 402.

"The police power of the States, and that with respect to municipal corporations, and to many other things that might be named, are of the same absolute character." 100 U.S. at 559.

The interest of municipalities in efficiently safeguarding "the health and safety of entire urban populations" was weighed in *Camara v. Municipal Court*, 387 U.S. 523, 533, under this test:

"[I]n applying any reasonableness standard, including one of constitutional dimension, an argument that the public interest demands a particular rule must receive careful consideration."

As a fundamentally protected constitutional right, the Tenth Amendment stands with other fundamentally protected constitutional rights for the preservation of which this Court has demanded that Federal legislation pass a test higher than that of having a rational basis. See, *American Communication Assn v. Douds*, 339 U.S. 382, 400; *Dennis v. United States*, 341 U.S. 494, 508-509, 526-527; *United States v. C.I.O.*, 335 U.S. 106, 140 (Rutledge, J., concurring); *United States v. O'Brien*, 391 U.S. 367, 376-377; *Marchetti v. United States*, 390 U.S. 39, 44, 58.

Similarly, a higher protection is given to State and City Government operation in analyzing where congressional silence in an area of regulation nonetheless

can be said to have preempted[77] the field from State regulation under the Supremacy Clause, Art. VI, cl. 2 of the Constitution.

"In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker v. Brown*, 317 U.S. 341, 351.

This test takes into account "the peculiarities and special features of the Federal regulatory scheme in question." *Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 638. See also, *United Automobile, A. & A.I.W. v. Wisconsin Employment Relations Board*, 351 U.S. 266,

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[77]See e.g., *Hines v. Davidowitz*, 312 U.S. 52, 67; *Pennsylvania v. Nelson*, 350 U.S. 497, 500; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 229. *Pennsylvania v. Nelson*, 350 U.S. at 497, 501-505, declared several tests for finding Federal supercession. Second of these tests, *Id.* at 504, was whether "the federal statutes 'touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject.' [citing *Hines v. Davidowitz*, 312 U.S. 52]." Appellants urge that the obverse of this test must find the State and City interest so dominant in preserving the Federal system as to preclude the possibility of Federal interference by the 1974 Amendments being sustained. This Court reasoned similarly concerning congressional silence in §16 of the Fair Labor Standards Act in *Employees v. Missouri Public Health Dept*, 411 U.S. 279, 285. That Congress has acted in the 1974 Amendments to make explicit the interference with States and Cities (here in violation specifically of the Eleventh Amendment; see *infra* section 5) which this Court would not infer in *Employees* merely makes this congressional action unconstitutional.

275 ("We would not interpret an act of Congress to leave [States] powerless to avert [violence] without compelling directions to that effect.")

In this case, there is no possibility of an "unexpressed purpose" to nullify State and City control over Government operations. Congress clearly has spoken in § 6 of the Act, Pub. L. No. 93-259, 88 Stat. 55 amending 29 U.S.C. § 203. But Congress has failed to give compelling directions and reasons supporting its interference with State and City Government. This Court should apply the same protection of State and City Government integrity here where Congress has clearly spoken in opposition to our system of constitutional Federalism, as where Congress' intention is construed to avoid interference with States and Cities. Only the result is different here: the 1974 Amendments cannot be saved by construction; they are unconstitutional and must so be declared.

The States not having surrendered such unique and unusual powers to regulate their own employees as to terms and conditions of employment, the Federal government has no such constitutional power. The States surrendered only a part of their power to the Federal government.

Although he made a much quoted statement about the Tenth Amendment in *United States v. Darby*, 312 U.S. 100, 124 that:

> "The amendment states but a truism and all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. . ."

Mr. Justice Jackson also said there:

". . . all is retained that has not been surrendered."

Chief Justice Marshall wrote:

> "In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." *McCulloch v. Maryland*, 4 Wheat. 316, 410.

No constitutional power is given or implied to burden the instrumentalities by which States and their political subdivisions exercise their governmental functions. The National War Labor Board rendered a landmark war-time decision written by Wayne Morse, but concurred in by all members, holding that the Federal Government did not have constitutional power to fix wages and salaries of state and local government officers and employees – even in war time. In so deciding the Board said:

> "It has never been suggested that the Federal Government has the power to regulate with respect to the wages, working hours, or conditions of employment of those who are engaged in performing service for the states or their political subdivisions. Any action by the National War Labor Board in attempting to regulate such matters by directive order would be beyond its

power and jurisdiction. The employes involved in the instant cases are performing services for political subdivisions of state governments. *Any directive order of the National War Labor Board which purported to regulate the wages, the working hours, or the conditions of employment of state or municipal employes would constitute a clear invasion of the sovereign rights of the political subdivisions of local state government.*

In the Matter of Municipal Government, City of Newark, et al., National War Labor Board, Nos. 47 and 726 (1942), reprinted in full in Rhyne, LABOR UNIONS AND MUNICIPAL LAW, at 228-240 (1946) (emphasis added).

Interestingly enough, a concurring opinion states at 241:

"It is unreasonable to believe that a Federal agency or Board can deal with better judgment or with greater justice in these cases than the regularly elected and constituted officers of these municipalities.

If the public authority were to be centralized in the hands of Federal officials, it would be inevitable that the American system of government would be destroyed.

It is clear that the National War Labor Board has no jurisdiction in these cases through any of the provisions of the Constitution of the United States, or through any Federal or State law." (emphasis added).

In our Federal scheme of government, the entire nation is composed of a Union of separate and equal state governments, and the concept of Federalism[78]

[78]"Federalism in the United States embraces the following elements: (1) as in all federations, the union of several autonomous political entities, or 'States', for common purposes;

rests on the belief that the national Government will fare best if the states and their local governments are left free to perform their governmental function in their separate ways as best adapted to local needs and views.

Such a system embodies a concept in which the national government, in protecting federal rights and interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the states. Mr. Justice Stone, in *Educational Films Corp. v. Ward*, 282 U.S. 379 noted that:

"The necessity of marking those boundaries [which define the limits of the powers and immunities of state and national governments] grows out of our constitutional system, under which both the federal and the state governments exercise their authority over one people within the territorial limits of the same state. The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those affairs committed to it by the Constitution, without

(2) the division of legislative powers between a 'National Government', on the one hand, and constituent 'States', on the other, which division is governed by the rule that the former is 'a government of enumerated powers' while the latter are governments of 'residual powers'; (3) the direct operation, for the most part, of each of these centers of government, within its assigned sphere, upon all persons and property within its territorial limits; (4) the provision of each center with the complete apparatus of law enforcement, both executive and judicial; (5) the supremacy of the 'National Government' within its assigned sphere over any conflicting assertion of 'State' power; (6) dual citizenship." CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. Doc. No. 92-82, 92d Cong., 2d Sess. XVIII (1972).

undue interference from the other." 282 U.S. at 391-392.

On this concept of the relationship between the Federal government and the States, Mr. Justice Black in *Younger v. Harris*, 401 U.S. 37, said for the Court:

> "This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism,' The concept does not mean blind deference to 'States Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of the Union of States, occupies a highly important place in our Nation's history and its future." 401 U.S. at 44-45.

And this Court has said in a case in which it found a provision of an Act of Congress (The Federal Home Owners' Loan Act of 1933) to be an unconstitutional encroachment upon the reserved powers of the States under the Tenth Amendment:

> "[T]he Tenth Amendment preserves a field of autonomy against federal encroachment." *Hopkins Federal Savings Ass'n v. Cleary*, 296 U.S. 315, 337 (1935).

3. The Federal Government Cannot Justify, Under Any Test, Usurpation Of State And City Government Functions Under An Act Designed To Regulate Private Industry.

The 1974 Amendments included within the coverage of the Act all State and City employees with minor exclusions.[79] The fact that certain of these employees are given exemptions and exceptions later in the Act in no way changes the Federal assertion of power (including the power to exempt) over all State and City

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[79]Section 3(e) of the Act, 29 U.S.C. § 203(e), as amended by Section 6 of Pub. L. No. 93-259 (App. to this Brief, *infra*, 4a), provides in relevant part:

> "(e)(1) Except as provided in paragraphs (2) and (3), the term 'employee' means any individual employed by an employer.
>
> (2) In the case of an individual employed by a public agency, such term means -
>
> * * *
>
> "(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual -
>
> "(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and
>
> "ii) who -
>
> "(I) holds a public elective office of that State, political subdivision, or agency,
>
> "(II) is selected by the holder of such an office to be a members of his personal staff,
>
> "(III) is appointed by such an office-holder to serve on a policymaking level, or
>
> "(IV) who is an immediate adviser to such an office-holder with respect to the constitutional or legal powers of his office."

Government employees.[80]

The Court in *Wirtz* recognized the truth of the congressional declaration of full power of usurpation:

> "Nor is it relevant that Congress originally chose to exempt all state enterprises and later partially removed that exemption. Congress was as free to include state activities within the general regulation at a later date as it would have been to omit the exemption in the first place." 392 U.S. at 199 n.28.

In applying the higher-than-rational basis test to the text of the 1974 Amendments and the Act here challenged, and to the facts of this Case, this Court must balance the need of local flexibility against a Federal imposition of rigidity. And in doing so the vast differences between private business for whom the Act is written and the public business for which Governments exist must be kept in mind. This Act was written for private business and the regulations issued under it were written for private business. They do not fit Government or public business. Defendant has so admitted as to 85% of the regulations issued. (Pritchard Deposition at 121-123, App. 167-69). Nowhere is this difference between public business and private business illustrated better than in the variety of tasks Government must perform.

The District Court below found as a fact that "the institutions whose employees are in question here

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[80]C.f., *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 115, and *Choteau v. Burnet*, 283 U.S. 691, 697, construing inclusion of "gross income" within the tax statutes, now 26 U.S.C. § 61 (1970), to include all income, "from whatever source derived" subject to exclusion in other sections of the Internal Revenue Code.

perform governmental functions not seriously in competition with private industry." (App. 650). The functions so found not to be within the "competition" nexus of *Wirtz* are the entirety of State and City functions, (Complaint ¶16, App. 16), each of which involves State and City personnel and personnel costs.

a. The Act violates the principles of local autonomy and of local "ballot box" control over governmental functions.

The system of checks and balances upon which our Nation has thrived includes above all the checks and balances inherent in strong State and local Governments each free to experiment in meeting its responsibilities without centralized Federal control.

Local Government is based on need, thus it is as varied as the need requirements of each community. Climate, topography, rivers, lakes, seas, all play a part.

The variety of our Federal system is strengthened by the wholesomeness of local and regional variations. Disadvantaged particularly by the restrictions of the 1974 Amendments on volunteerism are the rural and sparsely settled parts of our Nation.

In *Sailors v. Board of Education*, 387 U.S. 105, 110-111, a County school board election scheme was upheld, the Court saying:

> "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation."

See also, *Phoenix v. Kolodziejski*, 399 U.S. 204, 209.

As Justice Brandeis warned in *New State Ice Co. v. Liebmann*:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country." 285 U.S. 262, 311 (dissenting opinion).

This Court must consider the Commerce Clause against the needs of the entire constitutional scheme of Federalism,[81] in evaluating whether a claim of Federal power to dictate 85% of City and State budgets, and to eliminate fair and reasonable State and City personnel law, can stand.

Our constitutional scheme of Federalism includes the guarantee of ballot box control by citizens over their governmental units; this is the People's power guaranteed by the Tenth Amendment. In *Hadley v. Junior College District*, 397 U.S. 50, the unifying factor behind this right of local control over governmental functions was recognized:

> "The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement. While the particular offices involved in these cases have varied, in each case a constant factor is the decision of the government to have citizens participate individually by ballot in the selection of certain people who carry out governmental functions." 397 U.S. 50 at 54.

[81] The Constitution mentions States 114 times.

Included within the constitutionally protected governmental functions under Federalism are the necessary fiscal decisions comprising the budgetary process of each unit of local Government. Thus, the County Commissioner's Court held subject to ballot box control in *Avery v. Midland County*, 390 U.S. 474, was described as "representative of most of the general governing bodies of American cities, counties, towns and villages" in that:

> "It sets a tax rate, equalizes assessments, and issues bonds. It then prepares and adopts a budget for allocating the county's funds, and is given by statute a wide range of discretion in choosing the subjects on which to spend. In adopting the budget the court makes both long-term judgments about the way Midland County should develop – whether industry should be solicited, roads improved, recreation facilities built and land set aside for schools – and immediate choices among competing needs." 390 U.S. at 483.

Here, the 1974 Amendments remove from State and local "ballot box control" decisions on the extent and nature of State and City Government services. No one has elected Appellee; no one has elected his Administrator of Wages and Hours and the hundreds of Federal employees of that Division, who now under the Act will decide important salary questions with salaries constituting 85% of city budgets. (Pritchard Deposition at 125-126, App. 170-171) These Federal officials are not responsible to the needs and wishes of citizens in 18,000 Cities and 50 States. (Pritchard Deposition at 212-13, App. 230-31)

b. The 1974 Amendments irrationally affect, under the commerce power, Governments which are not in commerce.

The Appellee argues that States are within the commerce power grasp of Congress because States import goods from other States and use these goods in providing services entirely intrastate. S. Rept. No. 93-960, 93d Cong., 2d Sess. 24; Appellee's Motion to Affirm 11-12. Under this reasoning, a State or City would be within the Federal commerce power solely because it purchased a fire truck made in Detroit to put out intrastate fires or a trash truck made in Detroit to collect trash. Whether such a situation is within the Fair Labor Standards Act is before this Court on a question of statutory construction. *Iowa v. Brennan*, No. 73-1565, *petition for cert. filed*, 43 U.S.L.W. 3064. In any case, to say that such a nexus to commerce will pass "strict scrutiny"[82] and counterbalance "indispensable democratic freedoms"[83] would shock those who have acted to preserve "Our Federalism"[84] from irrational interference.

The Appellee's Motion to Affirm at page 21 claims that spreading employment to more workers is a goal of the Act. However sensible this reasoning, carried through the Act from its inception[85] to the present[86]

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[82] *Skinner v. Oklahoma*, 316 U.S. 535, 541.

[83] *Thomas v. Collins*, 323 U.S. 516, 530.

[84] *Younger v. Harris*, 401 U.S. 37, 44.

[85] H.R. Rept. No. 1452, 75th Cong., 1st Sess. 7-9 (1937); S. Rept. No. 884, 75th Cong., 1st Sess. 3 (1937).

[86] See, S. Rept. No. 1487, 89th Cong., 2d Sess. 22 (1966); H. Rept. No. 871, 89th Cong., 1st Sess., 30-31 (1966), concerning application of the Act to State-owned schools and hospitals.

may be as applied to private industry, where the cost of training a new employee and the cost of carrying a new pensioner may be passed on to the consumer, it cannot reasonably be applied here, where States and Cities operate under debt and tax limitations.

As to the specific essential Government functions with which the 1974 Amendments interfere, the Federal Courts have recently reaffirmed that the collection of State taxes is primarily of local nature and activities incidental to it do not amount to the production of goods for commerce. In *Hodgson v. Hyatt Realty*, 353 F. Supp. 1363 (M.D.N.C. 1973), *aff'd sub nom. Brennan v. Hyatt Realty*, No. 73-1869 (4th Cir., filed January 10, 1974), the manufacture of state license plates and their sale was held not to come within the Fair Labor Standards Act coverage:

> "The employees in the present case do not produce goods *for commerce*. The various items and information they handle is done pursuant to their duty to collect taxes. *** The scheme set up by the State to collect its taxes has primarily intrastate influence." 353 F. Supp. at 1374 (emphasis in original).

In describing the State function of tax collection, the Court stated:

> "Tax money is not a good under the Act. Using the most general term in the definition of 'goods', tax monies are not 'articles or subjects of commerce' (29 U.S.C. §203(i)). They are a quantity derived from a power unique to the State. As such, they are the product of a very local, intrastate activity." 353 F. Supp. at 1372.

c. Appellee's regulations under the Act violate the Fifth Amendment's Due Process requirements.

The Appellee and his Wage and Hour Administrator have not promulgated new regulations, suited to the unique nature of Government, for the bulk of State and City employees, except for regulations covering police and fire personnel, 39 Fed. Reg. 44141 (Dec. 20, 1974) which were published 6 working days before their effective date.[87]

1) The regulations in effect as of December 31, 1974 do not take into account the peculiar nature of Government, in violation of Due Process.

Especially where criminal penalties are imposed, the failure of a statute[88] or regulation[89] to inform "what the [Government] commands or forbids" has been held to violate Due Process. "No one may be required at peril of life, liberty or property to speculate as to the

[87]These regulations, and enforcement of the Act against States and Cities and the effective date of certain parts of the 1974 Amendments, have been stayed by this Court until further order of Court. Nos. A-553 and A-556, Stay Order issued Dec. 31, 1974, and extended by the Court, Jan. 13, 1975.

[88]See *Connally v. General Construction Co.*, 269 U.S. 385, 391; *Winters v. New York*, 333 U.S. 507, 515; *United States v. Harriss*, 347 U.S. 612, 617; *Lambert v. California*, 355 U.S. 225, 227-230.

[89]See *United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 674.

meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453.

The 1974 Amendments and the Regulations thereunder promulgated by the Secretary violate the Fifth Amendment requirement of Due Process. The Fair Labor Standards Act, which is in its entirety applied to States and Cities by the 1974 Amendments, contains both civil penalty provisions[90] and criminal penalties.[91]

The Act is necessarily broad and general in its language. To "provide a practical guide to employers and employees as to how the office [the Secretary's Administrator of the Wage and Hour Division] representing the public interest[92] in its enforcement will seek to apply it." *Skidmore v. Swift & Co.*, 323 U.S. 134, 138, Regulations have been promulgated. These regulations now comprise one 691-page volume of the Code of Federal Regulations. These regulations are 85%

[90]"Liquidated damages" are provided by Section 16(b), 29 U.S.C. § 216(b) in an amount equal to back wages, for violation of the minimum wage or overtime provisions of the Act.

[91]Sec. 16(a), 29 U.S.C. § 216(a) provides criminal penalties for willful violations of the minimum wage or overtime provisions of the Act.

[92]The very language of *Skidmore* shows the irrationality and unconstitutionality of applying the Act to State and local Government: the Administrator of Wages and Hours, in enforcing the 1974 Amendments, must purport to represent the "public interest" while interpreting an Act which usurps personnel decision-making from locally elected State and City officials. In the name of the "public interest", a non-elected Federal employee in Washington is empowered by the 1974 Amendments here challenged to impose his views on the citizens of 50 States and 18,000 municipalities in derogation of the decisions of the elected officers of those Governments.

inapplicable to States and Cities. (Pritchard Deposition at 121-123, App. 167-69).

Police and fire personnel are actually disadvantaged by the special regulations covering them. Under 29 C.F.R. §553.15, sleeping and eating time must be included as hours worked where a shift of exactly 24 hours is assigned; for employees other than police and fire personnel, sleeping and eating time is deducted from hours worked where a shift of exactly 24 hours is assigned. 29 C.F.R. §785.21.[93] Since a shift of exactly 24 hours is by far the most common for fire personnel (Pritchard Deposition at 169, 170-71, App. 201-03), the "special treatment" accorded City and State Governments costs State and local taxpayers even more money, without a rational basis.

2) The police and fire personnel regulations, designed for States and Cities, were published 6 business days before their effective date, making compliance impossible in violation of Due Process.

Appellee's regulations covering terms and conditions of employment of State and local police and fire fighters which were printed in the Federal Register of December 20, 1974, allowed such an unreasonably short time as to make compliance by State and local governments impossible. No State or local Government could possibly receive and act upon those regulations in the some six business days allowed over the Christmas holidays. This Court can take judicial notice that few

[93]This section is one of the regulations promulgated with industry in mind, and automatically made applicable to States and Cities by the 1974 Amendments.

State and local Governments could have received these regulations by mail in the time Defendant provided. To give the notices, to hold the hearings, and to take the law and budget actions required by State and local law within the time allowed is clearly impossible. To assess and act upon the shocking reversal by the regulations of customary practices as to sleep and meal time requires State and local Government law and budgetary changes of vast impact.

These regulations have a "ripple" controlling effect beyond police and fire fighters on the whole of local government employee terms and conditions, a matter of difficult and enormous troubles in that 85% of local budgets are made up of employee salaries. (Pritchard Deposition at 125-26, App. 170-71).

In this Case, it cannot be said that the Act does not greatly affect State and City operations. Paragraphs 44-72 of the Complaint, (App. 27-36) show the fiscal impact on States and Cities of the Act, based on 25 of 18,000 Cities and 10 of the 50 States; Deposition Exhibits 1-36, 38-48 (App. 311-565, 568-587), add the fiscal impact on more States. The totals of those expert estimates are: $57,000,000 in first year costs for only the 25 Cities and 10 States, with a $200,000,000 estimate of first year increased costs for all firemen, and an expert informed estimate of over one billion dollars in 1975 in increased costs.

The majority of increased costs resulting from the Amendments do not flow from the Act's basic mandates regarding minimum wages and maximum hours. The greater portion of the budget-breaking fiscal impact projected for this federally dictated policy stems from the generalized regulatory provisions under the

Act and the Act's history of application to private enterprise. When these policies collide with the diversity of State and local Government practices, the result is to force additional costs upon those Governments. This result is illustrated by examples given in the Complaint in the areas of compensatory time off (Complaint ¶¶49, 66; App. 29-30, 35), flexible scheduling practices (Complaint ¶¶49; App. 29-30) employment of student interns (Complaint ¶¶49, 60; App. 29-30, 33-34), police and fire training (Complaint ¶¶56, 69-70; App. 32, 35-36), availability of "reserve" policemen (Complaint ¶57; App. 32-33) and paid volunteers (Complaint ¶28, App. 21) institution of affirmative action programs (Complaint ¶59, App. 33) computation of payrolls (Complaint ¶63, App. 34) membership on volunteer boards and commissions (Complaint ¶65, App. 34-35) and joint employment (Complaint ¶¶29, 46; App. 22, 29)

4. In No Case Other Than *Maryland v. Wirtz* Has Federal Usurpation Of State And City Government Operation Been Upheld In Derogation Of The Fundamental Constitutional Protection Of Constitutional Federalism And That Case Was Wrongly Decided.

Maryland v. Wirtz, 392 U.S. 183, is the only Decision to uphold Federal power to control and regulate State and City Government governmental functions by calling them commerce. For the reasons set forth here and, in greater detail, *supra* at pages 26-29, it is respectfully urged that *Wirtz* was wrongly decided and should be overruled. The majority in *Wirtz* rejected the reasoning of the dissent by Mr. Justice Douglas, concurred in by Mr. Justice Stewart that " . . . Congress could under today's decision declare a whole state an 'enterprise' affecting

commerce and take over its budgeting activities." (392 U.S. at 196 footnote 27). Yet that is precisely what Congress did in the 1974 Amendments here challenged.

The opinion of a divided Court in *Wirtz* did not address itself to the question of this case, whether a Federal act which irreparably harms States and Cities in conflict with valid, fair and reasonable State and City laws and policies for the operation of States and Cities can have a rational basis. The opinion in *Wirtz* is neatly divided into consideration of two principal challenges to the 1966 amendments to the Fair Labor Standards Act. The Court, at 392 U.S. 188-193, considered the rationality of the "enterprise concept" as applied to all employees, including those of the private sector. There is no discussion here of rationality of the "enterprise concept" as applied to the facts of the case, that is, as applied to States. The majority opinion, at 392 U.S. 195-199, then considered whether the Tenth Amendment to the Constitution could stand in the way of "the Federal Government, when acting within a delegated power," 392 U.S. at 195. The missing logical connective, of course, is whether the power is rationally delegated and the Federal Government can rationally act within the delegated commerce power when it takes action usurping State governmental power and dictates to States and Cities the extent of essential Government services. The opinion of the divided Court in *Wirtz* treated this connective, the essence of the instant Case, only cursorily. In doing so, the Court found facts and enunciated law which are not here controlling. The Court found with respect to the challenge there:

> "The Act establishes only a minimum wage and a maximum limit of hours unless overtime wages

are paid, and does not otherwise affect the way in which school and hospital duties are performed. Thus appellants' characterization of the question in this case as whether Congress may, under the guise of the commerce power, tell the States how to perform medical and educational functions is not factually accurate." 392 U.S. at 193.

The vast new Federal records, and reports and decisions required by the Act of States and Cities and the restructuring of State and local employment practices from State and City to Federal control, are enormously costly. Governor Askew of Florida estimates an annual $800,000 for new "Federally mandated record keeping costs under the Act" for his State. (Defendant's Ex. 43 to Byrley Deposition and Complaint ¶37; App. 575-576, 25)

Appellee offers no estimate of the total cost which application of the Act and Regulations will impose as to other State and City employees. The Senate Committee Report on the Act estimated a first year cost of $128,000,000 and a second year cost of $162,000,000. (S. Rept. No. 300, 93d Cong., 1st Sess. 26 (1973)). The House Report estimated an absurd first year cost of $250,000 for the Federal Government and an equally absurd $3,000,000 per year as the cost for the next 5 years. (H.R. Rept. No. 913, 93d Cong., 2d Sess. 41 (1974)).

That the dissent was correct and the majority wrong about the danger of the Congress declaring an entire State Government an "enterprise" and thereby assuming power to virtually draw up each State's budget is clear. That is exactly what has happened under the 1974 Amendments. And while the Congress made no credible

study of the cost impact of these Amendments to State and local Government, this Brief demonstrates that the cost impact is enormous. The majority's reliance in *Wirtz* upon a *de minimis* impact from the 1966 amendments was also erroneous when considered against the facts of record herein that salaries are 80 to 85% of City budgets. (Pritchard Deposition at 125-26, App. 170-71).

Under these circumstances *Wirtz* is not controlling and in fact *Wirtz* should be expressly overruled. The Court did not consider the impact of the 1966 amendments on the entire constitutional scheme of Federalism, including the many other recognitions in the Constitution of that system of Government apart from and in addition to the Tenth Amendment.

A close examination of the cases relied upon by the majority opinion in *Wirtz*, 392 U.S. at 193-199, shows that no case cited by the Court involved a challenge to Federal interference with State or City Government operations. Each case cited dealt either with situations where the interest of the Federal Government was held superior to the interest of the States in regulating private industry, or with situations where a State was held to be directly engaged in commercial competition with a particular private industry. Neither situation is present in this Case; without case support applicable to this Case, *Wirtz* stands alone, and cannot govern this Case.[94]

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[94]On a related point, *Wirtz*, 392 U.S. at 195 n.26 cites two cases (one concerning the National Labor Relations Act and one concerning the Fair Labor Standards Act applied to private industry) to support the point that "engagement of an enterprise in interstate commerce may consist of importation [of goods

The principal case support[95] for the rejection in *Wirtz* of the argument for application of the Tenth Amendment was found in *Sanitary District v. United States*, 266 U.S. 405, 426,[96] and *United States v. California*, 297 U.S. 175, 181-183, 183-185.[97]

Sanitary District enjoined the withdrawal by a political subdivision of a State from Lake Michigan of water for sewage carriage in amounts greater than authorized by the Secretary of War. That decision cannot be read without reference to the treaty power and the conduct of foreign relations by the Federal Government.[98] Despite the Court's dictum to the

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from outside the State]." The Fair Labor Standards Act case, *Wirtz v. Hardin & Co.*, 253 F. Supp. 579 (N.D. Ala. 1964) *aff'd*, 359 F.2d 792 (5th Cir. 1966), found insufficient evidence that "some employees regularly receive groceries and produce from points outside the State of Alabama," 253 F. Supp. at 586 and doubted the plaintiff "intended to press [this] allegation of the complaint." 253 F. Supp. at 586.

[95]See Appellee's Motion to Affirm at 18-19.

[96]Treated in *Wirtz*, 392 U.S. at 195-196.

[97]Treated in *Wirtz*, 392 U.S. at 197-199.

[98]So, the war power must be considered an essential factor in the holding of *Case v. Bowles*, 327 U.S. 92, 101, cited in *Wirtz*, 392 U.S. at 195, as rejecting the existence of a "general" doctrine implied in the Federal Constitution that "the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other." The Court in *Case*, 327 U.S. at 102, found essential to the war power, congressional regulation of sales and rents (there, sale of timber from State-owned lands); the intention of the Federal statute was seen to be the coverage of "sales of commodities by states." 327 U.S. at 100.

contrary, 266 U.S. at 426, the decision does not hold the commerce power a sufficient grant of Federal power to interfere with State governmental operations.

More importantly, *Sanitary District* involved the power of the Federal Government to prohibit interference by States with interstate commerce (there, navigable waterways). The rational basis for legislation supporting that goal is much more apparent than the connection in the amendments upheld in *Wirtz* between State Government and commerce. So, here, States do not interfere with commerce or with any interstate activity, as by erecting trade barriers or inhibiting interstate travel; they merely pay some 11,000,000 employees wages to perform Government services intrastate.

United States v. California upheld the requirement of certain safety devices under the Federal Safety Appliance Act to a State-owned railroad serving a wharf. Implicit in that holding, however, is the finding that "the larger part of [the cars transported on the state-owned railroad] has its origin or destination in states other than California." 297 U.S. at 181-182. The Court in *Wirtz* did not find that State-owned schools and hospitals produced either goods or services with destinations in other States; certainly the District Court below in this Case did not find any such activity.

Beyond its lack of consistency with the holding and effect of *Wirtz* (in serving the Congress as an imprimatur for interference with State and City Governement operations)[99] *California* is even less applicable to this case than it was in *Wirtz*. In *Wirtz*,

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[99]See H.R. Rept. No. 913, 93d Cong., 2d Sess. 6-7 (1974).

392 U.S. at 198, the Court cited *California* as "controlling" and proceeded to conclude:

> "[This Court] will not carve up the commerce power to protect enterprises *indistinguishable in their effect on commerce from private businesses*, simply because those enterprises happen to be run by the States for the benefit of their citizens." 392 U.S. at 198-199 (emphasis added).

In this Case, the District Court has found, under Rule 56, Fed.R.Civ.P.,[100] that States and Cities here are not in serious competition with other States and Cities or with private businesses.

It is respectfully submitted that a take-over or swallowing up of control over State and local governmental powers which those Governments have exercised since the founding of our Nation is much more serious than the Court there recognized.

Santa Cruz Fruit Packing Co. v. NLRB, 303 U.S. 453, reaffirmed the prevention of labor disputes which burden interstate commerce as a rational basis for Federal labor legislation. The facts of *Santa Cruz* indicate that an actual dispute arose; the Court's recounting of it makes clear its industrial setting, always involving other industries shipping the same goods down the "stream of commerce":

> "The immediacy of the effect of the forbidden discrimination against these warehousemen is strikingly shown by the findings of the Board. When the men found themselves locked out because of their joining the union, they at once formed a picket line and this was maintained with such effectiveness that eventually 'the movement

[100]Opinion of the District Court below, App. 650.

> of trucks from warehouse to wharves ceased entirely.' The teamsters refused to haul, the warehousemen at the dock warehouses declined to handle, and the stevedores between dock and ship refused to load, petitioner's goods. These became, in the parlance of the men, 'hot' cargo. Petitioner says that this was an unlawful conspiracy of those sympathizing with its discharged warehousemen, but it was the discrimination against them which led directly to the interference with the movement from the plant and elicited the support so effectively given.
>
> It would be difficult to find a case in which unfair labor practices had a more direct effect upon interstate and foreign commerce." 303 U.S. at 468-469.

See also, *NLRB v. Fainblatt*, 306 U.S. 601, 604; *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 221; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34; *United States v. Darby*, 312 U.S. 100, 123.

The statement in *Jones & Laughlin*, 301 U.S. at 36, that "burdens and obstructions [are] not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce", and that "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control," 301 U.S. at 37, must be read with the next sentence:

> "*. . .the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects*

upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U.S. at 37. (emphasis added)

The impact of the totality of the Act upon State and local Governments by the Federal Government and the higher purposes of Federalism of the Constitution were not adequately considered or evaluated in *Wirtz*. It is urged that when these impacts are considered and those higher purposes are applied, *Wirtz* will be found to have been wrongly decided. See *supra* pages 26-30.

5. The 1974 Amendments Also Violate the Eleventh Amendment, An Essential Element in the Constitutional Scheme of Federalism.

The origins and evolution of the Eleventh Amendment, well known to this Court, further indicate a conviction on the part of the Founding Fathers, the early Congresses and this Court to recognize the unique status of the States under the Constitution. Thus, as early as the constitutional ratification by the States, Hamilton expressed the concept that sovereign State Governments, no less than the National Government, should remain immune from suit absent their consent:

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in

the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article on taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on this conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced?" THE FEDERALIST No. 81.

A judicial attempt to deny this inherent governmental right of the States in *Chisholm v. Georgia*, 2 Dall. 419, was met with the swift, overwhelming adoption of the Eleventh Amendment.[101] Since its enactment, the scope of the Amendment has been broadened by Court interpretation to grant a State immunity from suit brought against it in Federal Courts by its own citizens as well as those of another State. *Hans v. Louisiana*, 134 U.S. 1, *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, *Employees v. Missouri Public Health Dept.*, 411 U.S. 279.

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[101] See *New Hampshire v. Louisiana*, 108 U.S. 76,88.

In *Employees*, this Court refused to apply the doctrine of implied consent articulated in *Parden v. Terminal R. Co.*, 377 U.S. 184, to governmental operations. In barring the employee back pay suits sought under the 1966 Fair Labor Standards Act amendments, this Court stated:

> "Thus we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum."
>
> * * *
>
> "It is one thing, as in *Parden*, to make a state employee whole; it is quite another to let him recover double against a state. Recalcitrant private employers may be whipped into line in that manner. But we are reluctant to believe that Congress in pursuit of a harmonious federalism desired to treat the States so harshly." 411 U.S. at 285, 286.

In spite of the above *caveat*, continued congressional indifference to the unique role of State Governments in our Constitutional structure is manifested in the 1974 Amendments to the Act.[102] Congress has now explictly granted a cause of action by any employee against a public agency for back pay and liquidated damages, thus allowing State employees to sue States without their consent. Such retroactive damage suits are

[102]By amending the Portal to Portal Act of 1974, in the 1974 Amendments here challenged, Congress legislatively overruled this Court's decision in *Employees* by a provision which "suspends the statute of limitations to preserve rights of actions of State or local government employees which would otherwise be barred as a result of the Supreme Court's decision." S. Rept. No. 690, 93d Cong. 2d Sess. 27 (1974). See also H.R. Rept. No. 913, 93d Cong. 2d Sess. 45 (1974).

violative of the Eleventh Amendment as construed in *Edelman v. Jordan*, 415 U.S. 651.

The new Amendments also authorize the Secretary of Labor, without restrictions, to bring suits on behalf of employees for back pay and liquidated damages. This legerdemain allows use of the Secretary's position as an official of the Federal Government to funnel employee damage suits around the Eleventh Amendment's assurance of sovereign immunity. This is similar to calling government commerce! It is clear that such a tactic cannot be upheld when, under the Eleventh Amendment, preservation of a State's sovereign immunity "is to be determined not by the mere titular parties but by the essential nature and effect of the proceeding as it appears from the entire record". *Ex Parte New York*, 256 U.S. 490, 500.

Cases upholding the Federal Government's power to bring suit against a State have done so only where States had violated the constitutional rights of their citizens and Congress had the power to authorize judicial actions to end such violations. *United States v. Mississippi*, 380 U.S. 128; *Louisiana v. United States*, 380 U.S. 145. In distinction, the States here are depriving no one of constitutional rights. On the contrary, the States are carrying out the efficient performance of their constitutionally mandated governmental powers by providing fair and reasonable terms and conditions of employee employment.

CONCLUSION

Because the 1974 Amendments to the Fair Labor Standards Act, Pub. L. No. 93-259, cannot under the Commerce Clause abrogate the system of Federalism provided in the entirety of the Constitution, this Act and these Amendments cannot constitutionally be applied to States, political subdivisions of States and Cities. These 1974 Amendments violate the principle of Federalism embodied throughout the Constitution, and violate the Fifth, Tenth and Eleventh Amendments. The Appellee's regulations, under the Act and under the 1974 Amendments' changes to the Act, violate the Fifth Amendment. The Order of the District Court below must be reversed with directions to grant the declaratory and permanent injunctive relief prayed for in the Complaint.

Respectfully submitted,

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APPENDIX

1974 AMENDMENTS TO FAIR LABOR STANDARDS ACT, PORTAL TO PORTAL ACT OF 1947, AND AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

Public Law 93-259
93rd Congress, S. 2747
April 8, 1974

An Act

To amend the Fair Labor Standards Act of 1938 to increase the minimum wage rate under that Act, to expand the coverage of the Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Fair Labor Standards Amendments of 1974.

SHORT TITLE; REFERENCES TO ACT

SECTION 1. (a) This Act may be cited as the "Fair Labor Standards Amendments of 1974". 29 USC 203 note.

(b) Unless otherwise specified, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the section or other provision amended or repealed is a section or other provision of the Fair Labor Standards Act of 1938 (29 U.S.C. 201-219). 52 Stat. 1060.

INCREASE IN MINIMUM WAGE RATE FOR EMPLOYEES COVERED BEFORE 1966

SEC. 2. Section 6(a)(1) is amended to read as follows: 80 Stat. 838. 29 USC 206.

"(1) not less than $2 an hour during the period ending December 31, 1974, not less than $2.10 an hour during the year beginning January 1, 1975, and not less than $2.30 an hour after December 31, 1975, except as otherwise provided in this section;".

INCREASE IN MINIMUM WAGE RATE FOR NONAGRICULTURAL EMPLOYEES COVERED IN 1966 AND 1974

SEC. 3. Section 6(b) is amended (1) by inserting ", title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments of 1974" after "1966", and (2) by striking out paragraphs (1) through (5) and inserting in lieu thereof the following: 86 Stat. 373. 20 USC 1681.

"(1) not less than $1.90 an hour during the period ending December 31, 1974,

"(2) not less than $2 an hour during the year beginning January 1, 1975,

"(3) not less than $2.20 an hour during the year beginning January 1, 1976, and

"(4) not less than $2.30 an hour after December 31, 1976."

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INCREASE IN MINIMUM WAGE RATE FOR AGRICULTURAL EMPLOYEES 88 STAT. 56

SEC. 4. Section 6(a)(5) is amended to read as follows:

"(5) if such employee is employed in agriculture, not less than—

"(A) $1.60 an hour during the period ending December 31, 1974,

"(B) $1.80 an hour during the year beginning January 1, 1975,

"(C) $2 an hour during the year beginning January 1, 1976,

"(D) $2.20 an hour during the year beginning January 1, 1977, and

"(E) $2.30 an hour after December 31, 1977."

INCREASE IN MINIMUM WAGE RATES FOR EMPLOYEES IN PUERTO RICO AND THE VIRGIN ISLANDS

SEC. 5. (a) Section 5 is amended by adding at the end thereof the following new subsection: 63 Stat. 911. 29 USC 205.

"(e) The provisions of this section, section 6(c), and section 8 shall not apply with respect to the minimum wage rate of any employee employed in Puerto Rico or the Virgin Islands (1) by the United States or by the government of the Virgin Islands, (2) by an establishment which is a hotel, motel, or restaurant, or (3) by any other retail or service establishment which employs such employee primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs. The minimum wage rate of such an employee shall be determined under this Act in the same manner as the minimum wage rate for employees employed in a State of the United States is determined under this Act. As used in the preceding sentence, the term 'State' does not include a territory or possession of the United States.".

(b) Effective on the date of the enactment of the Fair Labor Standards Amendments of 1974, subsection (c) of section 6 is amended by striking out paragraphs (2), (3), and (4) and inserting in lieu thereof the following:

"(2) Except as provided in paragraphs (4) and (5), in the case of any employee who is covered by such a wage order on the date of enactment of the Fair Labor Standards Amendments of 1974 and to whom the rate or rates prescribed by subsection (a) or (b) would otherwise apply, the wage rate applicable to such employee shall be increased as follows:

"(A) Effective on the effective date of the Fair Labor Standards Amendments of 1974, the wage order rate applicable to such employee on the day before such date shall—

"(i) if such rate is under $1.40 an hour, be increased by $0.12 an hour, and

"(ii) if such rate is $1.40 or more an hour, be increased by $0.15 an hour.

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"(B) Effective on the first day of the second and each subsequent year after such date, the highest wage order rate applicable to such employees on the date before such first day shall—

"(i) if such rate is under $1.40 an hour, be increased by $0.12 an hour, and

"(ii) if such rate is $1.40 or more an hour, be increased by $0.15 an hour.

In the case of any employee employed in agriculture who is covered by a wage order issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 5, to whom the rate or rates prescribed by subsection (a)(5) would otherwise apply, and whose hourly wage is increased above the wage rate prescribed by such wage order by a subsidy (or income supplement) paid, in whole or in part, by the government of Puerto Rico, the increases prescribed by this paragraph shall be applied to the sum of the wage rate in effect under such wage order and the amount by which the employee's hourly wage rate is increased by the subsidy (or income supplement) above the wage rate in effect under such wage order.

"(3) In the case of any employee employed in Puerto Rico or the Virgin Islands to whom this section is made applicable by the amendments made to this Act by the Fair Labor Standards Amendments of 1974, the Secretary shall, as soon as practicable after the date of enactment of the Fair Labor Standards Amendments of 1974, appoint a special industry committee in accordance with section 5 to recommend the highest minimum wage rate or rates, which shall be not less than 60 per centum of the otherwise applicable minimum wage rate in effect

Infra.
63 Stat. 915;
75 Stat. 70.
29 USC 208.

80 Stat. 839.
29 USC 206.

Ante, p. 56

under subsection (b) or $1.00 an hour, whichever is greater, to be applicable to such employee in lieu of the rate or rates prescribed by subsection (b). The rate recommended by the special industry committee shall (A) be effective with respect to such employee upon the effective date of the wage order issued pursuant to such recommendation, but not before sixty days after the effective date of the Fair Labor Standards Amendments of 1974, and (B) except in the case of employees of the government of Puerto Rico or any political subdivision thereof, be increased in accordance with paragraph (2)(B).

"(4)(A) Notwithstanding paragraph (2)(A) or (3), the wage rate of any employee in Puerto Rico or the Virgin Islands which is subject to paragraph (2)(A) or (3) of this subsection, shall, on the effective date of the wage increase under paragraph (2)(A) or of the wage rate recommended under paragraph (3), as the case may be, be not less than 60 per centum of the otherwise applicable rate under subsection (a) or (b) or $1.00, whichever is higher.

"(B) Notwithstanding paragraph (2)(B), the wage rate of any employee in Puerto Rico or the Virgin Islands which is subject to paragraph (2)(B), shall, on and after the effective date of the first wage increase under paragraph (2)(B), be not less than 60 per centum of the otherwise applicable rate under subsection (a) or (b) or $1.00, whichever is higher.

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"(5) If the wage rate of an employee is to be increased under this subsection to a wage rate which equals or is greater than the wage rate under subsection (a) or (b) which, but for paragraph (1) of this subsection, would be applicable to such employee, this subsection shall be inapplicable to such employee and the applicable rate under such subsection shall apply to such employee.

"(6) Each minimum wage rate prescribed by or under paragraph (2) or (3) shall be in effect unless such minimum wage rate has been superseded by a wage order (issued by the Secretary pursuant to the recommendation of a special industry committee convened under section 8) fixing a higher minimum wage rate."

Infra.
63 Stat. 915;
69 Stat. 711.
29 USC 208.

(c)(1) The last sentence of section 8(b) is amended by striking out the period at the end thereof and inserting in lieu thereof a semicolon and the following: "except that the committee shall recommend to the Secretary the minimum wage rate prescribed in section 6(a) or 6(b), which would be applicable but for section 6(c), unless there is substantial documentary evidence, including pertinent unabridged profit and loss statements and balance sheets for a representative period of years or in the case of employees of public agencies other appropriate information, in the record which establishes that the industry, or a predominant portion thereof, is unable to pay that wage."

Ante, p. 55.
Ante, p. 56.

(2) The third sentence of section 10(a) is amended by inserting after "modify" the following: "(including provision for the payment of an appropriate minimum wage rate)".

69 Stat. 712;
72 Stat. 948.
29 USC 210.

(d) Section 8 is amended (1) by striking out "the minimum wage prescribed in paragraph (1) of section 6(a) in each such industry" in the first sentence of subsection (a) and inserting in lieu thereof "the minimum wage rate which would apply in each such industry under paragraph (1) or (5) of section 6(a) but for section 6(c)", (2) by striking out "the minimum wage rate prescribed in paragraph (1) of section 6(a)" in the last sentence of subsection (a) and inserting in lieu thereof "the otherwise applicable minimum wage rate in effect under paragraph (1) or (5) of section 6(a)", and (3) by striking out "prescribed in paragraph (1) of section 6(a)" in subsection (c) and inserting in lieu thereof "in effect under paragraph (1) or (5) of section 6(a) (as the case may be)".

75 Stat. 70.

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FEDERAL AND STATE EMPLOYEES

"Employer."
52 Stat. 1060; 80 Stat. 830. 29 USC 203.

SEC. 6. (a) (1) Section 3(d) is amended to read as follows:

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization."

"Employee."
80 Stat. 832.

(2) Section 3(e) is amended to read as follows:

"(e) (1) Except as provided in paragraphs (2) and (3), the term 'employee' means any individual employed by an employer.

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"(2) In the case of an individual employed by a public agency, such term means—

"(A) any individual employed by the Government of the United States—

"(i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code),

80 Stat. 378.

"(ii) in any executive agency (as defined in section 105 of such title),

"(iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,

"(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

"(v) in the Library of Congress;

"(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

"(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

"(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

"(ii) who—

"(I) holds a public elective office of that State, political subdivision, or agency,

"(II) is selected by the holder of such an office to be a member of his personal staff,

"(III) is appointed by such an officeholder to serve on a policymaking level, or

"(IV) who is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office.

"(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.".

"Industry."
52 Stat. 1060.

(3) Section 3(h) is amended to read as follows:

"(h) 'Industry' means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.".

75 Stat. 65; 86 Stat. 375.

(4) Section 3(r) is amended by inserting "or" at the end of paragraph (2) and by inserting after that paragraph the following new paragraph:

"(3) in connection with the activities of a public agency,".

80 Stat. 831; 86 Stat. 375.

(5) Section 3(s) is amended—

(A) by striking out in the matter preceding paragraph (1) "including employees handling, selling, or otherwise working on goods" and inserting in lieu thereof "or employees handling, selling, or otherwise working on goods or materials",

88 STAT. 60
80 Stat. 831. 29 USC 203.

(B) by striking out "or" at the end of paragraph (3),

(C) by striking out the period at the end of paragraph (4) and inserting in lieu thereof "; or",

(D) by adding after paragraph (4) the following new paragraph:

"(5) is an activity of a public agency.", and

(E) by adding after the last sentence the following new sentence: "The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.".

"Public agency."
52 Stat. 1060; 80 Stat. 832.

(6) Section 3 is amended by adding after subsection (w) the following:

"(x) 'Public agency' means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.".

75 Stat. 65. 29 USC 204.

(b) Section 4 is amended by adding at the end thereof the following new subsection:

"(f) The Secretary is authorized to enter into an agreement with the Librarian of Congress with respect to individuals employed in the Library of Congress to provide for the carrying out of the Secretary's functions under this Act with respect to such individuals. Notwithstanding any other provision of this Act, or any other law, the Civil Service Commission is authorized to administer the provisions of this Act with respect to any individual employed by the United States (other than an individual employed in the Library of Congress, United States Postal Service, Postal Rate Commission, or the Tennessee Valley Authority). Nothing in this subsection shall be construed to affect the right of an employee to bring an action for unpaid minimum wages, or unpaid overtime compensation, and liquidated damages under section 16(b) of this Act.".

29 USC 216.

52 Stat. 1063; 80 Stat. 842. 29 USC 207.

(c) (1) (A) Effective January 1, 1975, section 7 is amended by adding at the end thereof the following new subsection:

"(k) No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

"(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed 240 hours; or

"(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 240 hours bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed."

Effective date. Supra.

(B) Effective January 1, 1976, section 7(k) is amended by striking out "240 hours" each place it occurs and inserting in lieu thereof "232 hours".

Effective date.

(C) Effective January 1, 1977, such section is amended by striking out "232 hours" each place it occurs and inserting in lieu thereof "216 hours".

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Effective date. Ante, p. 60.

(D) Effective January 1, 1978, such section is amended—

(i) by striking out "exceed 216 hours" in paragraph (1) and inserting in lieu thereof "exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975"; and

(ii) by striking out "as 216 hours bears to 28 days" in paragraph (2) and inserting in lieu thereof "as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days".

75 Stat. 71; 80 Stat. 837. 29 USC 213.

(2)(A) Section 13(b) is amended by striking out the period at the end of paragraph (19) and inserting in lieu thereof "; or" and by adding after that paragraph the following new paragraph:

"(20) any employee of a public agency who is employed in fire protection or law enforcement activities (including security personnel in correctional institutions);".

Effective date. Supra.

(B) Effective January 1, 1975, section 13(b)(20) is amended to read as follows:

"(20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or".

Studies. 29 USC 213 note.

(3) The Secretary of Labor shall in the calendar year beginning January 1, 1976, conduct (A) a study of the average number of hours in tours of duty in work periods in the preceding calendar year of employees (other than employees exempt from section 7 of the Fair Labor Standards Act of 1938 by section 13(b)(20) of such Act) of public agencies who are employed in fire protection activities, and (B) a study of the average number of hours in tours of duty in work periods in the preceding calendar year of employees (other than employees exempt from section 7 of the Fair Labor Standards Act of 1938 by section 13(b)(20) of such Act) of public agencies who are employed in law enforcement activities (including security personnel in correctional institutions). The Secretary shall publish the results of each such study in the Federal Register.

Supra.

Publication in Federal Register. 52 Stat. 1069; 75 Stat. 74. 29 USC 216.

(d)(1) The second sentence of section 16(b) is amended to read as follows: "Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.".

Statute of limitations, suspension. 61 Stat. 87. 29 USC 255.

(2)(A) Section 6 of the Portal-to-Portal Pay Act of 1947 is amended by striking out the period at the end of paragraph (c) and by inserting in lieu thereof a semicolon and by adding after such paragraph the following:

"(d) with respect to any cause of action brought under section 16(b) of the Fair Labor Standards Act of 1938 against a State or a political subdivision of a State in a district court of the United States on or before April 18, 1973, the running of the statutory periods of limitation shall be deemed suspended during the period beginning with the commencement of any such action and ending one hundred and eighty days after the effective date of the Fair Labor Standards Amendments of 1974, except that such suspension shall not be applicable if in such action judg-

88 STAT. 62

ment has been entered for the defendant on the grounds other than State immunity from Federal jurisdiction.".

(B) Section 11 of such Act is amended by striking out "(b)" after "section 16".

61 Stat. 89. 29 USC 240.

DOMESTIC SERVICE WORKERS

SEC. 7. (a) Section 2(a) is amended by inserting at the end the following new sentence: "That Congress further finds that the employment of persons in domestic service in households affects commerce."

52 Stat. 1060; 63 Stat. 910. 29 USC 202.

(b)(1) Section 6 is amended by adding after subsection (e) the following new subsection:

80 Stat. 842. 29 USC 206.

"(f) Any employee--

"(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under section 6(b) unless such employee's compensation for such service would not because of section 209(g) of the Social Security Act constitute wages for the purposes of title II of such Act, or

64 Stat. 479; 68 Stat. 1079. 42 USC 409.

"(2) who in any workweek—

"(A) is employed in domestic service in one or more households, and

"(B) is so employed for more than 8 hours in the aggregate,

shall be paid wages for such employment in such workweek at a rate not less than the wage rate in effect under section 6(b)."

Ante, p. 60.

(2) Section 7 is amended by adding after the subsection added by section 6(c) of this Act the following new subsection:

Ante, p. 60.

"(l) No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a)."

(3) Section 13(a) is amended by adding at the end the following new paragraph:

75 Stat. 71; 80 Stat. 837. 29 USC 213.

"(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)."

(4) Section 13(b) is amended by adding after the paragraph added by section 6(c) the following new paragraph:

Ante, p. 61.

"(21) any employee who is employed in domestic service in a household and who resides in such household; or".

RETAIL AND SERVICE ESTABLISHMENTS

SEC. 8. (a) Effective January 1, 1975, section 13(a)(2) (relating to employees of retail and service establishments) is amended by striking out "$250,000" and inserting in lieu thereof "$225,000".

Effective date. 80 Stat. 837.

(b) Effective January 1, 1976, such section is amended by striking out "$225,000" and inserting in lieu thereof "$200,000".

Effective date.

(c) Effective January 1, 1977, such section is amended by striking out "or such establishment has an annual dollar volume of sales which is less than $200,000 (exclusive of excise taxes at the retail level which are separately stated)".

Effective date.

TOBACCO EMPLOYEES

SEC. 9. (a) Section 7 is amended by adding after the subsection added by section 7(b)(2) of this Act the following:

Ante.

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"(m) For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if such employee—

"(1) is employed by such employer—

"(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

"(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

"(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

"(2) receives for—

"(A) such employment by such employer which is in excess of ten hours in any workday, and

"(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.".

Repeal. 75 Stat. 71; 80 Stat. 838. 29 USC 213. Ante, p. 62.

(b)(1) Section 13(a)(14) is repealed.

(2) Section 13(b) is amended by adding after the paragraph added by section 7(b)(4) of this Act the following new paragraph:

"(22) any agricultural employee employed in the growing and harvesting of shade-grown tobacco who is engaged in the processing (including, but not limited to, drying, curing, fermenting, bulking, rebulking, sorting, grading, aging, and baling) of such tobacco, prior to the stemming process, for use as cigar wrapper tobacco; or".

TELEGRAPH AGENCY EMPLOYEES

Repeal.

SEC. 10. (a) Section 13(a)(11) (relating to telegraph agency employees) is repealed.

Supra.

(b)(1) Section 13(b) is amended by adding after the paragraph added by section 9(b)(2) of this Act the following new paragraph:

"(23) any employee or proprietor in a retail or service establishment which qualifies as an exempt retail or service establishment under paragraph (2) of subsection (a) with respect to whom the provisions of sections 6 and 7 would not otherwise apply, who is engaged in handling telegraphic messages for the public under an agency or contract arrangement with a telegraph company where the telegraph message revenue of such agency does not exceed $500 a month, and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or".

Ante, pp. 55, 60.

Effective date.

(2) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, section 13(b)(23) is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours".

88 STAT. 64

Repeal; effective date. Ante, p. 63.

(3) Effective two years after such date, section 13(b)(23) is repealed.

SEAFOOD CANNING AND PROCESSING EMPLOYEES

75 Stat. 71. 29 USC 213.

SEC. 11. (a) Section 13(b)(4) (relating to fish and seafood processing employees) is amended by inserting "who is" after "employee", and by inserting before the semicolon the following: ", and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed".

Effective date.

(b) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, section 13(b)(4) is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours".

Repeal; effective date.

(c) Effective two years after such date, section 13(b)(4) is repealed.

NURSING HOME EMPLOYEES

80 Stat. 833.

SEC. 12. (a) Section 13(b)(8) (insofar as it relates to nursing home employees) is amended by striking out "any employee who (A) is employed by an establishment which is an institution (other than a hospital) primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises" and the remainder of that paragraph.

80 Stat. 842. 29 USC 207.

(b) Section 7(j) is amended by inserting after "a hospital" the following: "or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises".

HOTEL, MOTEL, AND RESTAURANT EMPLOYEES AND TIPPED EMPLOYEES

Supra.

SEC. 13. (a) Section 13(b)(8) (insofar as it relates to hotel, motel, and restaurant employees) (as amended by section 12) is amended (1) by striking out "any employee" and inserting in lieu thereof "(A) any employee (other than an employee of a hotel or motel who performs maid or custodial services) who is", (2) by inserting before the semicolon the following: "and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed", and (3) by adding after such section the following:

"(B) any employee of a hotel or motel who performs maid or custodial services and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or".

Effective date.

(b) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, subparagraphs (A) and (B) of section 13(b)(8) are each amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-six hours".

Effective date.

(c) Effective two years after such date, subparagraph (B) of section 13(b)(8) is amended by striking out "forty-six hours" and inserting in lieu thereof "forty-four hours".

Repeal; effective date.

(d) Effective three years after such date, subparagraph (B) of section 13(b)(8) is repealed and such section is amended by striking out "(A)".

80 Stat. 830. 29 USC 203.

(e) The last sentence of section 3(m) is amended to read as follows: "In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an

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amount in excess of 50 per centum of the applicable minimum wage rate, except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.".

SALESMEN, PARTSMEN, AND MECHANICS

80 Stat. 836. 29 USC 213.

SEC. 14. Section 13(b)(10) (relating to salesmen, partsmen, and mechanics) is amended to read as follows:

"(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

"(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or".

FOOD SERVICE ESTABLISHMENT EMPLOYEES

SEC. 15. (a) Section 13(b)(18) (relating to food service and catering employees) is amended by inserting immediately before the semicolon the following: "and who receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed".

Effective date.

(b) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, such section is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours".

Repeal; effective date.

(c) Effective two years after such date, such section is repealed.

BOWLING EMPLOYEES

Effective date.

SEC. 16. (a) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, section 13(b)(19) (relating to employees of bowling establishments) is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours".

Repeal; effective date.

(b) Effective two years after such date, such section is repealed.

SUBSTITUTE PARENTS FOR INSTITUTIONALIZED CHILDREN

Ante, p. 63.

SEC. 17. Section 13(b) is amended by inserting after the paragraph added by section 10(b)(1) of this Act the following new paragraph:

"(24) any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children—

"(A) who are orphans or one of whose natural parents is deceased, or

"(B) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than $10,000; or".

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EMPLOYEES OF CONGLOMERATES

SEC. 18. Section 13 is amended by adding at the end thereof the following:

52 Stat. 1067. 71 Stat. 514. 29 USC 213. Ante, p. 65.

"(g) The exemption from section 6 provided by paragraphs (2) and (6) of subsection (a) of this section shall not apply with respect to any employee employed by an establishment (1) which controls, is controlled by, or is under common control with, another establishment the activities of which are not related for a common business purpose to, but materially support the activities of the establishment employing such employee; and (2) whose annual gross volume of sales made or business done, when combined with the annual gross volume of sales made or business done by each establishment which controls, is controlled by, or is under common control with, the establishment employing such employee, exceeds $10,000,000 (exclusive of excise taxes at the retail level which are separately stated), except that the exemption from section 6 provided by paragraph (2) of subsection (a) of this section shall apply with respect to any establishment described in this subsection which has an annual dollar volume of sales which would permit it to qualify for the exemption provided in paragraph (2) of subsection (a) if it were in an enterprise described in section 3(s).".

Ante, p. 57.

SEASONAL INDUSTRY EMPLOYEES

SEC. 19. (a) Section 7(c) and 7(d) are each amended—

80 Stat. 835. 29 USC 207.

(1) by striking out "ten workweeks" and inserting in lieu thereof "seven workweeks", and

(2) by striking out "fourteen workweeks" and inserting in lieu thereof "ten workweeks".

(b) Section 7(c) is amended by striking out "fifty hours" and inserting in lieu thereof "forty-eight hours".

(c) Effective January 1, 1975, sections 7(c) and 7(d) are each amended—

Effective date.

(1) by striking out "seven workweeks" and inserting in lieu thereof "five workweeks", and

(2) by striking out "ten workweeks" and inserting in lieu thereof "seven workweeks".

(d) Effective January 1, 1976, sections 7(c) and 7(d) are each amended—

Effective date.

(1) by striking out "five workweeks" and inserting in lieu thereof "three workweeks", and

(2) by striking out "seven workweeks" and inserting in lieu thereof "five workweeks".

(e) Effective December 31, 1976, sections 7(c) and 7(d) are repealed.

Repeal; effective date.

COTTON GINNING AND SUGAR PROCESSING EMPLOYEES

SEC. 20. (a) Section 13(b)(15) is amended to read as follows:

80 Stat. 836.

"(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup; or".

(b)(1) Section 13(b) is amended by adding after paragraph (24)

Ante, p. 15.

the following new paragraph:

"(25) any employee who is engaged in ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities and who receives compensation for employment in excess of—

"(A) seventy-two hours in any workweek for not more than six workweeks in a year,

"(B) sixty-four hours in any workweek for not more than four workweeks in that year,

"(C) fifty-four hours in any workweek for not more than two workweeks in that year, and

"(D) forty-eight hours in any other workweek in that year,

at a rate not less than one and one-half times the regular rate at which he is employed; or".

Effective date. (2) Effective January 1, 1975, section 13(b)(25) is amended— Ante, p. 66.

(A) by striking out "seventy-two" and inserting in lieu thereof "sixty-six";

(B) by striking out "sixty-four" and inserting in lieu thereof "sixty";

(C) by striking out "fifty-four" and inserting in lieu thereof "fifty";

(D) by striking out "and" at the end of subparagraph (C); and

(E) by striking out "forty-eight hours in any other workweek in that year," and inserting in lieu thereof the following: "forty-six hours in any workweek for not more than two workweeks in that year, and

"(E) forty-four hours in any other workweek in that year,".

Effective date. (3) Effective January 1, 1976, section 13(b)(25) is amended—

(A) by striking out "sixty-six" in subparagraph (A) and inserting in lieu thereof "sixty";

(B) by striking out "sixty" in subparagraph (B) and inserting in lieu thereof "fifty-six";

(C) by striking out "fifty" and inserting in lieu thereof "forty-eight";

(D) by striking out "forty-six" and inserting in lieu thereof "forty-four"; and

(E) by striking out "forty-four" in subparagraph (E) and inserting in lieu thereof "forty".

Ante, p. 66. (c)(1) Section 13(b) is amended by adding after paragraph (25) the following new paragraph:

"(26) any employee who is engaged in the processing of sugar beets, sugar beet molasses, or sugarcane into sugar (other than refined sugar) or syrup and who receives compensation for employment in excess of—

"(A) seventy-two hours in any workweek for not more than six workweeks in a year,

"(B) sixty-four hours in any workweek for not more than four workweeks in that year,

"(C) fifty-four hours in any workweek for not more than two workweeks in that year, and

"(D) forty-eight hours in any other workweek in that year,

at a rate not less than one and one-half times the regular rate at which he is employed; or".

Effective date. (2) Effective January 1, 1975, section 13(b)(26) is amended—

(A) by striking out "seventy-two" and inserting in lieu thereof "sixty-six";

(B) by striking out "sixty-four" and inserting in lieu thereof "sixty";

(C) by striking out "fifty-four" and inserting in lieu thereof "fifty";

(D) by striking out "and" at the end of subparagraph (C); and

(E) by striking out "forty-eight hours in any other workweek in that year," and inserting in lieu thereof the following: "forty-six hours in any workweek for not more than two workweeks in that year, and

"(E) forty-four hours in any other workweek in that year,".

(3) Effective January 1, 1976, section 13(b)(26) is amended— Effective date. Ante, p. 67.

(A) by striking out "sixty-six" in subparagraph (A) and inserting in lieu thereof "sixty";

(B) by striking out "sixty" in subparagraph (B) and inserting in lieu thereof "fifty-six";

(C) by striking out "fifty" and inserting in lieu thereof "forty-eight";

(D) by striking out "forty-six" and inserting in lieu thereof "forty-four"; and

(E) by striking out "forty-four" in subparagraph (E) and inserting in lieu thereof "forty".

LOCAL TRANSIT EMPLOYEES

SEC. 21. (a) Section 7 is amended by adding after the subsection added by section 9(a) of this Act the following new subsection: Ante, p. 62.

"(n) In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment."

(b)(1) Section 13(b)(7) (relating to employees of street, suburban or interurban electric railways, or local trolley or motorbus carriers) is amended by striking out ", if the rates and services of such railway or carrier are subject to regulation by a State or local agency" and inserting in lieu thereof the following: "(regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), if such employee receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed". 80 Stat. 836. 29 USC 213.

(2) Effective one year after the effective date of the Fair Labor Standards Amendments of 1974, such section is amended by striking out "forty-eight hours" and inserting in lieu thereof "forty-four hours". Effective date.

(3) Effective two years after such date, such section is repealed. Repeal; effective date.

COTTON AND SUGAR SERVICES EMPLOYEES

SEC. 22. Section 13 is amended by adding after the subsection added by section 18 the following: Ante, p. 66.

"(h) The provisions of section 7 shall not apply for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year to any employee who— Supra.

"(1) is employed by such employer—

"(A) exclusively to provide services necessary and incidental to the ginning of cotton in an establishment primarily engaged in the ginning of cotton;

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"(B) exclusively to provide services necessary and incidental to the receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility, other than one operated in conjunction with a cotton mill, primarily engaged in storing and compressing;

"(C) exclusively to provide services necessary and incidental to the receiving, handling, storing, and processing of cottonseed in an establishment primarily engaged in the receiving, handling, storing, and processing of cottonseed; or

"(D) exclusively to provide services necessary and incidental to the processing of sugar cane or sugar beets in an establishment primarily engaged in the processing of sugar cane or sugar beets; and

"(2) receives for—

"(A) such employment by such employer which is in excess of ten hours in any workday, and

"(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Any employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section or section 7.".

Ante, p. 68.

OTHER EXEMPTIONS

SEC. 23. (a)(1) Section 13(a)(9) (relating to motion picture theater employees) is repealed.

Repeal. 80 Stat. 836. 29 USC 213.

(2) Section 13(b) is amended by adding after paragraph (26) the following new paragraph:

Ante, p. 67.

"(27) any employee employed by an establishment which is a motion picture theater; or".

(b)(1) Section 13(a)(13) (relating to small logging crews) is repealed.

Repeal. 75 Stat. 71; 80 Stat. 838.

(2) Section 13(b) is amended by adding after paragraph (27) the following new paragraph:

"(28) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight.".

(c) Section 13(b)(2) (insofar as it relates to pipeline employees) is amended by inserting after "employer" the following: "engaged in the operation of a common carrier by rail and".

EMPLOYMENT OF STUDENTS

80 Stat. 842. 29 USC 214.

SEC. 24. (a) Section 14 is amended by striking out subsections (a), (b), and (c) and inserting in lieu thereof the following:

"SEC. 14. (a) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages, under special certificates issued pursuant to regulations of the Secretary, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Secretary shall prescribe.

Ante, p. 55.

"(b)(1)(A) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special

certificate issued under a regulation or order provide, in accordance with subparagraph (B), for the employment, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6 or not less than $1.60 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) in retail or service establishments.

Ante, p. 56. 80 Stat. 839. 29 USC 206.

"(B) Except as provided in paragraph (4)(B), during any month in which full-time students are to be employed in any retail or service establishment under certificates issued under this subsection the proportion of student hours of employment to the total hours of employment of all employees in such establishment may not exceed—

"(i) in the case of a retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) were covered by this Act before the effective date of the Fair Labor Standards Amendments of 1974—

"(I) the proportion of student hours of employment to the total hours of employment of all employees in such establishment for the corresponding month of the immediately preceding twelve-month period,

"(II) the maximum proportion for any corresponding month of student hours of employment to the total hours of employment of all employees in such establishment applicable to the issuance of certificates under this section at any time before the effective date of the Fair Labor Standards Amendments of 1974 for the employment of students by such employer, or

"(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment,

whichever is greater;

"(ii) in the case of retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) are covered for the first time on or after the effective date of the Fair Labor Standards Amendments of 1974—

"(I) the proportion of hours of employment of students in such establishment to the total hours of employment of all employees in such establishment for the corresponding month of the twelve-month period immediately prior to the effective date of such Amendments,

"(II) the proportion of student hours of employment to the total hours of employment of all employees in such establishment for the corresponding month of the immediately preceding twelve-month period, or

"(III) a proportion equal to one-tenth of the total hours of employment of all employees in such establishment,

whichever is greater; or

"(iii) in the case of a retail or service establishment for which records of student hours worked are not available, the proportion of student hours of employment to the total hours of employment of all employees based on the practice during the immediately preceding twelve-month period in (I) similar establishments of the same employer in the same general metropolitan area in which such establishment is located, (II) similar establishments of the same or nearby communities if such establish-

ment is not in a metropolitan area, or (III) other establishments of the same general character operating in the community or the nearest comparable community.

"Student hours of employment." For purpose of clauses (i), (ii), and (iii) of this subparagraph, the term 'student hours of employment' means hours during which students are employed in a retail or service establishment under certificates issued under this subsection.

"(2) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment, at a wage rate not less than 85 per centum of the wage rate in effect under section 6(a)(5) or not less than $1.30 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) in any occupation in agriculture.

Ante, p. 56.

80 Stat. 839. 29 USC 206.

"(3) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by special certificate issued under a regulation or order provide for the employment by an institution of higher education, at a wage rate not less than 85 per centum of the otherwise applicable wage rate in effect under section 6 or not less than $1.60 an hour, whichever is the higher (or in the case of employment in Puerto Rico or the Virgin Islands not described in section 5(e), at a wage rate not less than 85 per centum of the wage rate in effect under section 6(c)), of full-time students (regardless of age but in compliance with applicable child labor laws) who are enrolled in such institution. The Secretary shall by regulation prescribe standards and requirements to insure that this paragraph will not create a substantial probability of reducing the full-time employment opportunities of persons other than those to whom the minimum wage rate authorized by this paragraph is applicable.

Regulations.

"(4)(A) A special certificate issued under paragraph (1), (2), or (3) shall provide that the student or students for whom it is issued shall, except during vacation periods, be employed on a part-time basis and not in excess of twenty hours in any workweek.

"(B) If the issuance of a special certificate under paragraph (1) or (2) for an employer will cause the number of students employed by such employer under special certificates issued under this subsection to exceed four, the Secretary may not issue such a special certificate for the employment of a student by such employer unless the Secretary finds employment of such student will not create a substantial probability of reducing the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection. If the issuance of a special certificate under paragraph (1) or (2) for an employer will not cause the number of students employed by such employer under special certificates issued under this subsection to exceed four—

"(i) the Secretary may issue a special certificate under paragraph (1) or (2) for the employment of a student by such employer if such employer certifies to the Secretary that the employment of such student will not reduce the full-time employment opportunities of persons other than those employed under special certificates issued under this subsection, and

"(ii) in the case of an employer which is a retail or service establishment, subparagraph (B) of paragraph (1) shall not apply with respect to the issuance of special certificates for such employer under such paragraph.

The requirement of this subparagraph shall not apply in the case of the issuance of special certificates under paragraph (3) for the employment of full-time students by institutions of higher education; except that if the Secretary determines that an institution of higher education is employing students under certificates issued under paragraph (3) but in violation of the requirements of that paragraph or of regulations issued thereunder, the requirements of this subparagraph shall apply with respect to the issuance of special certificates under paragraph (3) for the employment of students by such institution.

"(C) No special certificate may be issued under this subsection unless the employer for whom the certificate is to be issued provides evidence satisfactory to the Secretary of the student status of the employees to be employed under such special certificate."

(b) Section 14 is further amended by redesignating subsection (d) as subsection (c) and by adding at the end the following new subsection:

Ante, p. 69.

"(d) The Secretary may by regulation or order provide that sections 6 and 7 shall not apply with respect to the employment by any elementary or secondary school of its students if such employment constitutes, as determined under regulations prescribed by the Secretary, an integral part of the regular education program provided by such school and such employment is in accordance with applicable child labor laws."

Ante, pp. 60, 68.

(c) Section 4(d) is amended by adding at the end thereof the following new sentence: "Such report shall also include a summary of the special certificates issued under section 14(b)."

52 Stat. 1062; 69 Stat. 711. 29 USC 204. Ante, p. 69.

CHILD LABOR

SEC. 25. (a) Section 12 (relating to child labor) is amended by adding at the end thereof the following new subsection:

52 Stat. 1067; 63 Stat. 917. 29 USC 212.

"(d) In order to carry out the objectives of this section, the Secretary may by regulation require employers to obtain from any employee proof of age."

(b) Section 13(c)(1) (relating to child labor in agriculture) is amended to read as follows:

80 Stat. 834. 29 USC 213.

"(c)(1) Except as provided in paragraph (2), the provisions of section 12 relating to child labor shall not apply to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee—

Supra.

"(A) is less than twelve years of age and (i) is employed by his parent, or by a person standing in the place of his parent, on a farm owned or operated by such parent or person, or (ii) is employed, with the consent of his parent or person standing in the place of his parent, on a farm, none of the employees of which are (because of section 13(a)(6)(A)) required to be paid at the wage rate prescribed by section 6(a)(5),

80 Stat. 833. Ante, p. 56.

"(B) is twelve years or thirteen years of age and (i) such employment is with the consent of his parent or person standing in the place of his parent, or (ii) his parent or such person is employed on the same farm as such employee, or

"(C) is fourteen years of age or older.".

(c) Section 16 is amended by adding at the end thereof the following new subsection:

52 Stat. 1069; 71 Stat. 514. 29 USC 216.

"(e) Any person who violates the provisions of section 12, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness

Penalty.

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of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty, when finally determined, may be—

"(1) deducted from any sums owing by the United States to the person charged;

"(2) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

"(3) ordered by the court, in an action brought for a violation of section 15(a)(4), to be paid to the Secretary.

52 Stat. 1068. 29 USC 215.

Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5, United States Code, and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 2 of an Act entitled 'An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes' (29 U.S.C. 9a)."

80 Stat. 384.

48 Stat. 582; 53 Stat. 581.

SUITS BY SECRETARY FOR BACK WAGES

SEC. 26. The first three sentences of section 16(c) are amended to read as follows: "The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) to bring an action by or on behalf of any employee and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 6 and 7 or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary."

63 Stat. 919; 80 Stat. 844. 29 USC 216.

Ante, pp. 55, 68.

ECONOMIC EFFECTS STUDIES

SEC. 27. Section 4(d) is amended by—

(1) inserting "(1)" immediately after "(d)",

(2) inserting in the second sentence after "minimum wages" the following: "and overtime coverage"; and

(3) by adding at the end thereof the following new paragraphs:

Ante, p. 72.

"(2) The Secretary shall conduct studies on the justification or lack thereof for each of the special exemptions set forth in section 13 of this Act, and the extent to which such exemptions apply to employees of establishments described in subsection (g) of such section and the economic effects of the application of such exemptions to such

Ante, p. 72.

Ante, p. 66.

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employees. The Secretary shall submit a report of his findings and recommendations to the Congress with respect to the studies conducted under this paragraph not later than January 1, 1976.

Report to Congress.

"(3) The Secretary shall conduct a continuing study on means to prevent curtailment of employment opportunities for manpower groups which have had historically high incidences of unemployment (such as disadvantaged minorities, youth, elderly, and such other groups as the Secretary may designate). The first report of the results of such study shall be transmitted to the Congress not later than one year after the effective date of the Fair Labor Standards Amendments of 1974. Subsequent reports on such study shall be transmitted to the Congress at two-year intervals after such effective date. Each such report shall include suggestions respecting the Secretary's authority under section 14 of this Act.".

Reports to Congress.

Ante, p. 69.

AGE DISCRIMINATION

SEC. 28. (a)(1) The first sentence of section 11(b) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 630(b)) is amended by striking out "twenty-five" and inserting in lieu thereof "twenty".

81 Stat. 605.

(2) The second sentence of section 11(b) of such Act is amended to read as follows: "The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.".

(3) Section 11(c) of such Act is amended by striking out ", or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance".

(4) Section 11(f) of such Act is amended to read as follows:

"Employee."

"(f) The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.".

(5) Section 16 of such Act is amended by striking out "$3,000,000" and inserting in lieu thereof "$5,000,000".

29 USC 634.

(b)(1) The Age Discrimination in Employment Act of 1967 is amended by redesignating sections 15 and 16, and all references thereto, as sections 16 and 17, respectively.

(2) The Age Discrimination in Employment Act of 1967 is further amended by adding immediately after section 14 the following new section:

29 USC 633.

"NONDISCRIMINATION ON ACCOUNT OF AGE IN FEDERAL GOVERNMENT EMPLOYMENT

"SEC. 15. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in

29 USC 633a.

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80 Stat. 378.

section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

Enforcement.

"(b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

Reports.

"(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a);

"(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

"(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

Civil actions.

"(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

"(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

"(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law."

88 STAT. 76

EFFECTIVE DATE

SEC. 29. (a) Except as otherwise specifically provided, the amendments made by this Act shall take effect on May 1, 1974.

(b) Notwithstanding subsection (a), on and after the date of the enactment of this Act the Secretary of Labor is authorized to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act.

Approved April 8, 1974.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 93-913 accompanying H.R. 12435 (Comm. on Education and Labor) and No. 93-953 (Comm. of Conference).

SENATE REPORT No. 93-690 (Comm. on Labor and Public Welfare).

CONGRESSIONAL RECORD, Vol 120 (1974):

Feb. 28, Mar. 5, 7, considered and passed Senate.

Mar. 20, considered and passed House, amended, in lieu of H.R. 12435.

Mar. 28, Senate and House agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 10, No. 15:

Apr. 8, Presidential statement.

○

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In The

Supreme Court of the United States

October Term, 1974

No. 74-878

THE NATIONAL LEAGUE OF CITIES, ET AL.,
Appellants,

v.

THE HONORABLE PETER J. BRENNAN,
Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANTS

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BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF AMICI CURIAE

Amici Curiae are the Commonwealth of Virginia, the State of New York, The Virginia Municipal League and the Virginia Association of Counties. The membership of the Virginia Municipal League is composed of all the cities, a substantial number of the towns and some of the urban counties in Virginia. The membership of the Virginia Association of Counties is composed of virtually every county in Virginia.

The 1974 amendments to the Fair Labor Standards Act (FLSA) are of particular concern to the states and their political subdivisions. The consequences of those amendments are both untenable and burdensome; they are in conflict with constitutional federalism.

Each such state and each of its political subdivisions, like all American states and political subdivisions, have personnel systems which regulate the wages, hours, compensable time and other personnel matters of their employees. These systems vary from locality to locality depending upon the individualized need of the locality and its citizens. Moreover, each such state and its political subdivisions, like all American states and political subdivisions, confided responsibility for the raising and allocation of public funds to their elected governing bodies. In consequence of the magnitude of the sums necessary to alter the personnel system of each state and political subdivision to conform to the 1974 amendments to the FLSA, each of the undersigned states and its political subdivisions would suffer severe financial stringency and interference with its rendering of indispensable and unique public services to its citizenry.

This case constitutes a threat to the autonomy and independent existence of state and local governments and, indeed, to the legislative power over fiscal matters that has so long endured under our constitutional system.

ARGUMENT

I.

Maryland v. Wirtz Is Not Controlling.

The court below, in dismissing appellants' complaint for declaratory and injunctive relief, felt that its decision was controlled by this Court's decision in *Maryland* v. *Wirtz*,

392 U.S. 183 (1968). *National League of Cities* v. *Brennan*, ... F.Supp. ..... (D.C. D.C. 1974); App. at 6a.[1] Not only does *Wirtz* not control the decisions of this case, it is inapposite

The issue before this Court in *Wirtz* was the constitutionality of amendments extending the FLSA to state-operated schools and hospitals.[2] The rationale, as stated by Congress, for those amendments was:

> "These enterprises [state-operated schools and hospitals] which are not proprietary, that is, not operated for profit, and engaged in activities which are in substantial competition with enterprises organized for a business purpose." S. Rep. No. 1487, 89th Cong., 2d Sess., 1966 U.S. Cong. and Ad. News 3010 (1966); H.R. Rep. No. 1366, 89th Cong., 2d Sess. 16 (1966).

This Court in *Wirtz* found that, whether defended under the above rationale or under the "labor dispute" theory, the amendments had a sufficient rational basis to withstand the constitutional attack. In so doing, the Court limited its holding:

> "Congress has 'interfered with' these state functions only to the extent of providing that when a State employs people in performing such functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals." 392 U.S. at 193-194.

---

[1] Citations in this Brief in the form "App. ...." refer to the Appendix to the appellants' Jurisdictional Statement.

[2] 80 Stat. 831 and 832, 29 U.S.C. §§ 203(d) and 203(s)(4) (1964 ed., Supp. II).

Moreover, this Court reserved decision on the question

> "whether schools and hospitals have employees engaged in commerce.
>
> * * *
>
> Whether particular institutions have employees handling goods in commerce, cf. *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 87 L.Ed. 460, 63 S.Ct. 332, may be considered as occasion requires." 392 U.S. at 201.[3]

The court below erred in blindly applying the decision in *Wirtz* to this case. Not only did it refuse to heed the express limitations placed on *Wirtz* by this Court, it further failed to give consideration to the limited factual situation giving rise to the decisions in *Wirtz*.

> "Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard to variant controlling facts." *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).

Indeed, this Court in *Wirtz* recognized the necessity for examining federal statutes to ensure that they constitute a valid exercise of the commerce power of Congress: "This Court has examined and will continue to examine federal statutes to determine whether there is a rational basis for regarding them as regulations of commerce among the States." 392 U.S. 198.

A comparison of the facts in *Wirtz* with the facts of this case makes it abundantly clear that *Wirtz* cannot be

[3] The Court now has occasion for deciding this question. *Iowa* v. *Brennan*, No. 73-1565, *Petition for Cert. filed*, 43 U.S.L.W. 3637.

regarded as dispositive of the issues now before the Court. The impact of the 1966 amendments to the FLSA, in terms of the number of persons affected by and the amount of funds required to comply with the Act, is miniscule in relation to the overwhelming effects of the 1974 amendments. Only 9.6% of the full-time state and local government employees work for state-operated hospitals. *Public Employment in 1973*, U.S. Dep. of Commerce, Social and Economic Statistics Admin., Bureau of the Census, 3 Table C. From this number must be subtracted the exempt executive administrative and professional employees. 29 U.S.C. § 213(1), 75 Stat. 71. Individuals employed in education represent 49.6% of the full-time state and local government employees. *Public Employment in 1973, supra,* at 3 Table C. Of that number, however, more than half are teachers who were exempted under the 1966 amendments. *Id.* at 9 Table 3; 29 U.S.C. § 213(a)(1), 75 Stat. 71.

In contrast to the 1966 amendments, the 1974 amendments extend the coverage of the FLSA to almost 11,000,000[4] non-supervisory state and local government employees. The fiscal impact of the 1974 amendments for the first year, as estimated by the Senate committee, is $128,000,000.[5] S. Rep. No. 300, 93d Cong.; 1st Sess. 26 (1973). That Committee estimated the cost for the second year to be $162,000,000. *Id.* In light of the fact that personnel costs constitute a major portion of government operating budgets[6] and that state constitutions in many instances

[4] *Public Employment in 1973, supra,* at .....

[5] The appellee concedes that compliance with the overtime provisions for fire and police only will cost the states and localities $27,500,000 in 1975. 29 C.F.R. § 553.

[6] Personnel costs are 80 to 85% of city operating budgets. Deposition of Mr. Pritchard at 126-127.

place limitations on the amount of debt state and local governments may incur,[7] it can be fairly stated that the 1974 amendments will effectively remove the personnel and fiscal decision making process from the states and localities and their elected representatives and vest those decisions in the United States Secretary of Labor.

This Court did not have before it in *Wirtz* a federal regulatory scheme a fraction as pervasive as that created by the 1974 amendments. That every operation of government will be affected is amply demonstrated by appellants' complaint. The factual situation before this Court in *Wirtz* pales in the face of the spector of federal control over state and local governments which will be a direct result of the 1974 amendments. In light of the facts of this case, it cannot be said that *Wirtz* is dispositive of this case.

II.

The 1974 Amendments Exceed Constitutional Boundaries.

As stated in *Wirtz,*

> "There remains, of course, the question whether any particular statute is an 'otherwise valid regulation of commerce.' This Court has always recognized that the power to regulate commerce, though broad indeed, as limits." 392 U.S. at 196.

The 1974 amendments to the FLSA clearly exceed those limits.

The primary purpose of the FLSA when it was initially enacted in 1937 was the elimination of unfair competition

[7] For example, the Constitution of Virginia places ceilings on the amount of debt which may be contracted by the Commonwealth, Va. Const. Art. X, § 9, and her counties, cities and towns. Va. Constitution Art. VII, § 10.

arising from substandard wages and working conditions. S. Rep. No. 884, 75th Cong., 1st Sess. 2 (1937); H. Rep. No. 1452, 75th Cong., 1st Sess. (1937). *Joint Hearings on S. 2475 and H.R. 7200 Before the Sen. Comm. on Education and Labor and the House Comm. on Labor,* 75th Cong., 1st Sess. pt. 1 at 2-3 (1937). As stated by the Court in *United States* v. *Darby,* 312 U.S. 100, 115 (1941):

> "The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which commerce flows."

The 1966 and 1974 amendments were based on the same purpose. *Wirtz,* 392 U.S. at 190 n. 13; S. Rep. No. 690, 93rd Cong., 2d Sess. 4 (1974).

The elimination of unfair competition cannot form a basis for the 1974 amendments. Those amendments improperly extended the coverage of the FLSA to state and local government employees engaged in activities which are not in competition with businesses in the private sector. While the most obvious examples of such activities are police and fire protection, the judicial system, licensing and tax collection are also included. The list is endless and encompasses the totality of government. The concept of unfair competition, when applied to the totality of state and local government activity, has no factual support.

Not only is there no basis for Congresss conclusion that unfair competition will result unless the FLSA is extended to state and local government in their entirety, the premise upon which that conclusion is bottomed, the existence of

substandard wages, is totally erroneous. All of the undersigned States pay their employees wages equal to or exceeding the minimum wage requirements of the FLSA. Indeed, the House Report on the 1974 amendments recognized that "wage levels for State and local government employees not covered by FLSA are, on the average, substantially higher than workers already covered." H.R. Rep. No. 913, 93d Cong., 2d Sess. 28 (1974). Additionally, all of the undersigned states provide either premium overtime pay or compensatory leave for employees who work more than 40 hours a week. The House Report also recognized that a great many other states provide overtime pay. "The actual impact of a 40 hour standard would have been less because a substantial proportion of the employees receive premium overtime pay." *Id.* at 29.

Both the appellee and his predecessor, Secretary Hodgson, conceded the lack of any rational basis on which Congress could extend the FLSA to all state and local government activities. As stated by the appellee,

> "I realize that the 1966 Amendments extended the enterprise coverage to employees of hospitals, nursing homes, schools, and institutions of higher learning regardless of whether they were public or private or operated for profit or not for profit.
>
> "The reason for the extension to this group of employees was that failure to cover all employees of such institutions would constitute an unfair method of competition in commerce.
>
> "However, extension of coverage to all State and local government employees is too great an interference with State perogatives.
>
> "Imposition of the Federal standard for coverage, particularly overtime, could have a disruptive impact on many State civil service systems and the additional

> costs could overburden many small governmental units." *Hearings on H.R. 4757 anr H.R. 2831 Before the Subcommittee on Labor of the House Comm. on Education and Labor,* 93d Cong. 1st Sess. 203 (1973).

Secretary Hodgson shared that view:

> "We cannot support this proposal [coverage of state and local employees]. In 1966, enterprise coverage was extended to employees of hospitals, nursing homes, schools and institutions of higher learning regardless of whether they were public or private or operated for profit or not for profit. Here the Congress took the position that failure to cover all such institutions would have resulted in failure to implement one of the basic purposes of the Act—the elimination of conditions which constitute an unfair method of competition in commerce.
>
> "But extending coverage to all State and local employees is an entirely different matter. It would certainly involve the Federal Government in the regulation of the functions of State and local governments." *Hearings on H.R. 7130 Before the Subcom. on Labor of the House Comm. on Education and Labor,* 92d Cong., 1st Sess. pt. 1 at 552 (1971); *Hearings on S. 1861 and S. 2259 Before the Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare,* 92d Cong., 1st Sess. pt. 1 at 29 (1971).

In addition to lacking any rational basis, the 1974 amendments are at war with the fundamental concept of federalism and sovereignty embodied in and protected by the Tenth and Eleventh Amendments. If the 1966 amendments to the FLSA before the Court in *Wirtz* could be characterized as "pervasive, striking at all levels of state governments," 392 U.S. at 202 (Douglas, J., dissenting), then the impact of the 1974 amendments can only be described as overwhelming. No function of governmental activity will be

immune from their reach. In order to comply with the FLSA, State and local governments will be compelled to raise taxes, if they have the power to do so, or reduce or eliminate vital public services. Furthermore, in direct contravention of the Eleventh Amendment, *Edelman* v. *Jordan*, 415 U.S. 651 (1974), the 1974 amendments subject State and local governments to private individual and class actions in federal courts for double and, possibly, treble damages in addition to possible criminal penalties.

As was stated earlier, each of the undersigned States pays its employees wages at least equal to the minimum required by the FLSA. Each pays for overtime work or provides compensatory leave. The decision to provide such benefits is one which has been and must be made by each State. No two States are identical geographically, demographically, economically or in the needs of their citizens. Thus, the decision whether to provide certain services and the method of compensation of the employees providing those services must, of necessity, be vested in each State. To ignore this basic fact and to mandate exact uniformity, as Congress did in enacting the 1974 amendments, is to usurp the autonomy and sovereignty of the States protected by the Tenth Amendment and which has served this country so well since its creation.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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I, Anthony F. Troy, Deputy Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States hereby certify that three (3) copies of this Brief of Amici Curiae in Support of the Appellants have been served upon each of counsel of record for the parties herein by depositing same in the United States Post Office with first class postage prepaid, this the 17th day of March, 1975, as follows:

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BRIEF OF THE PUBLIC SERVICE RESEARCH COUNCIL AS AMICUS CURIAE

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United States v. Darby, 312 U.S. 100 (1941) 7,14,15

Wickard v. Filburn, 317 U.S. 111 (1942) 17,18

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Statutes:

Fair Labor Standards Act, 1966 Amendments, 80 Stat. 832, 29 U.S.C. § 203(d) (1970) 13,14

Fair Labor Standards Act, 1974 Amendments, Public Law 93-259, 88 Stat. 55, amending 29 U.S.C. § 201 et seq. (1970) 4,5,9,12,16,18, 20,22,23,24,26, 27,28

National Labor Relations Act, 29 U.S.C. §§ 151-68 (1970) 28

Congressional Bills:

H.R. 8677, 93d Cong. 1st Sess. (1973) 27

S. 3294, 3295, 93d Cong. 2d Sess. (1974) 28

Miscellaneous:

Blau, P.M., *Bureaucracy in Modern Society* (Random House, 1956) 9

Bok, D., and Dunlop, J., *Labor and the American Community* (1970) 29

Bureau of National Affairs, Government Employee Relations Report (G.E.R.R.) 27,28,29

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Crecine, J.P. (ed.), *Financing the Metropolis* (Sage Publications, 1970) 12

Dahl, R., *Who Governs? Democracy and Power in an American City* (Yale Press, 1961) 27

The Federalist 24

Horton, R., *Municipal Labor Relations in New York City: Lessons of the Lindsay-Wagner Years* (Praeger, 1973) 12

Kaufman, H., *Metropolitan Leadership* 27

McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 Colum. L. Rev. 1192 (1972) 30

Petro, S., *Sovereignty and Compulsory Public-Sector Bargaining*, 10 Wake Forest L. Rev. 25 (1974) 27,29

Polsby, N., *Community Power and Political Theory* (1963) 27

U.S. Department of Labor, *Summary of State Policy Regulations for Public Sector Labor Relations* (1963) 28

——, *Collective Bargaining in Public Employment and the Merit System* (1972) 29

Von Mises, L., *Bureaucracy* (Yale Press, 1944) 9

Washington, George, *Farewell Address* 8

Webster's *New International Dictionary* Unabridged (2d ed.) 6

Wellington, H., and Winter, R., *The Unions and the Cities* (The Brookings Institution 1971) 12

——, *The Limits of Collective Bargaining in Public Employment*, 78 Yale L.J. 1107 (1969) 29

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BRIEF OF THE PUBLIC SERVICE RESEARCH COUNCIL AS AMICUS CURIAE

This brief *amicus* in support of the Appellants is filed by the Public Service Research Council with the

consent of the parties as provided for in Rule 42(2) of the Rules of this Court.

INTEREST OF THE PUBLIC SERVICE RESEARCH COUNCIL

The Public Service Research Council is a voluntary association formed by a group of private citizens, legislators, scholars, and commentators united by a common concern with the maintenance of representative government and the tradition of constitutional federalism. The Council sees in this case and in the 1974 Amendments of the Fair Labor Standards Act, insofar as those amendments apply to State and local civil servants, a grave threat both to the integrity of representative government in the States and localities and to the constitutional federalism which has played so great a role in the history of this country and which, in the opinion of the Council, must be preserved if the personal liberties upon which this nation was founded are to survive.

While believing that the Appellants in these cases are seriously and skillfully defending their interests, the Public Service Research Council is concerned lest their natural preoccupation with the issues which interest them most immediately will cause them, and hence this Court, to overlook the deeper, broader, and more ominous issues involved in these cases. The premise of the legislation under attack here is that Congress has

power under the Commerce Clause to regulate every kind of activity known to mankind – so long as that activity somehow "affects" interstate commerce. On such a premise, the Council believes, Congress may arrogate to itself the power absolutely to annihilate the autonomy, and hence the responsibility and the integrity, of all the State and local governments. Specifically, the Council believes that if the 1974 FLSA Amendments are upheld, Congress can logically claim power to impose compulsory collective bargaining on all the States and localities, a policy which the Council considers destructive in the highest degree.

SUMMARY OF ARGUMENT

On any rational standard, the two activities, commerce and government, are categorically distinct. "Commerce," within the meaning of the United States Constitution, as well as in common understanding, involves voluntary exchanges by private persons, with the transactions determined by market forces and ruled by profit and loss. Government, on the other hand, involves rule-making and law-enforcing activities determined by political considerations and political decisions, not by market forces and balance-sheet considerations.

Since the terms and conditions of government employment, like government itself, are determined by political considerations, not by the market and by profit-and-loss considerations, the Fair Labor Standards

Act Amendments of 1974[1] must be viewed as regulations of government, not regulations of commerce, insofar as they relate to government employment. The fact that governmental activities *affect* commerce no more empowers Congress to regulate State and local government than the fact that love, marriage, and divorce likewise affect commerce would empower Congress to regulate *those* activities.

Appellee's reliance upon *Maryland v. Wirtz*[2] is misplaced. To the extent that it is not readily distinguishable, *Wirtz* is in fact ruling authority *against* the constitutionality of the FLSA Amendments of 1974.

The issue raised by the FLSA Amendments of 1974 here involved has nothing to do essentially with commerce. The great issue they raise goes to the survival of the federal system and of representative government in the States and municipalities. The Constitution establishes in the United States Government only one power and one duty in respect to the internal operation of State government, the power and the duty to guarantee to each State a republican form of government.[3] But examination of the 1974 Amendments demonstrates that, if upheld, they will weaken the responsiveness of local and State governments to their constituents – and thus betray rather than

[1] Pub. L. 93-259, 88 Stat. 55, amending 29 U.S.C. § 201 et seq.

[2] 392 U.S. 183 (1968).

[3] U.S. Const., Art. IV, Sec. 4.

perform the Federal Government's duty to guarantee to each State a republican form of government.

Posing a still more ominous threat to profound American values, the decision below, if affirmed, would go far toward establishing the constitutionality also of federal laws imposing in the public sector the compulsory collective bargaining regime now prevailing in the private sector.[4] However, when States and local governments are subjected to compulsory collective bargaining laws, it will be impossible correctly to describe them as republican forms of government.

This will be true especially when compulsory bargaining laws are complemented, as they are bound to be, by provisions for "neutral" "third party" arbitration of disputes between State and local governments and unions acting as exclusive bargaining representatives of their employees. If private arbitrators subject in no way to the electorate make ultimate, binding decisions concerning governmental budgets, both the one-man one-vote principle and representative government will have been gravely weakened.

For these reasons, the decision below should be reversed and P.L. 93-259 should be held unconstitutional insofar as it purports to regulate the employment terms and conditions of State and local government employees.

[4] IV. B., *infra*.

ARGUMENT

I.

COMMERCE AND GOVERNMENT ARE CATEGORICALLY DISTINCT ACTIVITIES.

Except for the fact that a sound decision in this case ultimately turns upon it, emphasizing the obvious distinction between commerce and government would be unnecessary. The two are sharply distinct from every relevant point of view. Their one significant common feature is that they are both conducted by human beings, and this common feature is irrelevant to the issues in the present case.

A. In Both Common Understanding and Constitutional Law, the Term "Commerce" Is Normally Associated with Voluntary Exchange, with Trading, and with Activities Integral to Trading and Exchange, such as Agriculture or Manufacturing and Their Incidents. The Unique and Essential Features of Commercial Activity Lie in Its Subordination to the Market and to the Laws of Supply and Demand and of Profit and Loss.

To spell out this point at great length would be idle pedantry. All authorities, legal and philological, agree with the common definition of commerce to be found in *Webster's Unabridged*:

> "Business intercourse; esp., the exchange or buying and selling of commodities, and particularly, the

> exchange of merchandise on a large scale between different places or communities; extended trade or traffic."

This Court has ruled that the Federal Commerce Power extends to agriculture, mining, manufacturing, and all the incidents thereto, as well as to trading and exchange.[5] However, such rulings, despite the excitement they caused at first, were no more than natural, logical extensions of the fundamental concept underlying the terms "commerce" or "exchange." Before there can be commerce or exchange, something must be produced for trading purposes. The person who produces for markets is as much engaged in commerce as the person to whom he sells or from whom he buys.

The essential features of commerce are (1) consensual activity – willing producers, buyers, and sellers whose efforts are bent toward satisfying the wishes of other producers, distributors, or consumers – and (2) determination of the terms of trade by considerations of profit and loss. The key to the distinction between commercial activity and governmental activity thus lies in part in the term "consensual" and in part in the intimately related fact that participants in commercial activity, unlike those in government, must make profits and avoid losses if they are to survive. Balanced books and consistent profits are vital features of commercial activity. They play no essential role, perhaps no role at all, in the activity called government.

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[5] Cf. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); United States v. Darby, 312 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942).

B. Government Is Force and Rule, Not Consent; and Its Measures Are Dictated by Political Considerations, Not by Market Forces or by Considerations of Profit and Loss.

Whereas mutual consent is the ruling principle of action between traders, the ruling principle of governmental action is force, rule, command. President George Washington expressed this truth succinctly. In his Farewell Address he said that:

> "Government is not reason, it is not eloquence – it is force. Like fire it is a dangerous servant and a fearful master; never for a moment should it be left to irresponsible action."

Government differs from commerce in another essential way. Besides relying upon force in contrast to consent, government decisions do respond and should respond to political considerations rather than to market considerations. The services which governments perform can never accurately be measured by market prices when, by definition, governments stand outside the market. As a famous economist and political theorist has written,

> "The objectives of public administration cannot be measured in money terms and cannot be checked by accountancy methods. Take a nation-wide police system like the F.B.I. There is no yardstick available that could establish whether the expenses incurred by one of its regional or local branches were not excessive.
>
> . . . .
>
> "In public administration there is no market price for achievements. This makes it indispensable

> to operate public offices according to principles entirely different from those applied under the profit motive."[6]

II.

INSOFAR AS THEY PURPORT TO GOVERN TERMS AND CONDITIONS OF PUBLIC EMPLOYMENT, THE FAIR LABOR STANDARDS ACT AMENDMENTS OF 1974 ARE REGULATIONS OF STATE AND LOCAL GOVERNMENT, NOT OF COMMERCE AMONG THE SEVERAL STATES.

The 1974 Amendments of the Fair Labor Standards Act extend the Act's wage and hour regulations to virtually all the nonsupervisory employees of *all* the State and local governments of the country.[7] Section 2(a) rests this extension on the Commerce Power. The theory seems to be that the Commerce Power gives Congress constitutional authority to regulate every phase of human life and action which somehow "affects commerce," for the concluding sentence of Section 2(a) declares

> "That Congress further finds that the employment of persons in domestic service in households affects commerce."

We do not challenge here the extension of the Fair Labor Standards Act to household servants. However,

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[6] L. von Mises, *Bureaucracy* 46-47 (Yale Press, 1944). *See also* P. M. Blau, *Bureaucracy in Modern Society* esp. at 107 et seq. (Random House, 1956).

[7] P.L. 93-259, Sec. 3(d)(e).

reference to this extension is nevertheless serviceable as an illustration of the extraordinary character of the Congressional assertion of power involved in the 1974 Amendments.

The Constitution of the United States does not authorize Congress to regulate every human activity in which, by its own arbitrary fiat, Congress finds an effect upon commerce. The Constitution gives Congress power

> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."[8]

No reasonable, fair-minded person can view the operation of a household as a "commercial activity." In the same way, no person acting in good faith can view the operation of government as a "commercial activity." Doubtlessly, both household and governmental activities *affect* commerce among the several states; but, to repeat, that is not the test of Congressional power under the Commerce Clause. Neither governments nor households are, in common understanding, engaged in commerce or trade or business activities of any normally recognizable variety. They are both modes of existence built around different values, they exist for different purposes, the things they do and the way they do them are structured by different considerations.

Commercial activity is designed to serve consumers, and its decisions are determined by considerations of profit and loss. Households are the physical embodiments of the family urge; and the expenditures they

[8] U.S. Const., Art. I, Sec. 8, Cl. 3.

make, while undoubtedly affecting commerce among the several states, are determined by noncommercial considerations of love, affection, and the like. Governments, similarly (in nontotalitarian countries, at any rate), are structured by and in accordance with noncommercial considerations. Obviously, to repeat, what governments do, like what families do, affects commerce. But governments are aimed at noncommercial ends, and, as pointed out above, their activities are determined essentially by political considerations, not by considerations of profit and loss.

From the economic point of view, governments, like families, are consumers – not producers of goods. Even in the so-called "proprietary" functions, governments are, on net, consumers. They normally run at deficits. The New York Subway System, for example, runs up an enormous deficit each year. So, too, probably, do most other governmental "proprietary" operations. Needless to say, police forces, fire departments, sanitation operations – these all (like the family) are nonprofit, nonbusiness operations. The violence done to language and meaning by the attempt to drag the family and government into the classification of "commerce among the several States" should be spurned by this Court.

To the extent that they apply to the wages and hours of the employees of the States and localities, the FLSA Amendments of 1974 must therefore be viewed as regulations of government, not of commerce. The monies which the States and localities expend on employment are no less governmental expenditures than those spent on courthouses, police stations, firehouses,

police cars, garbage trucks, roads, schoolhouses, etc., etc. These are all *governmental* – not commercial – expenditures. The allocations of public funds among them all are equally politically determined; they are not determined by considerations of profit and loss.[9] If this Court holds that Congress has the power to dictate to the States and localities their wage and hour policies, it must hold necessarily that Congress has power also to dictate to the States and localities as regards all other expenditures which somehow "affect commerce." How can such a holding be reconciled with the Constitution of the United States?

III.

APPELLEE'S RELIANCE UPON MARYLAND V. WIRTZ IS MISPLACED. WHERE NOT DISTINGUISHABLE FROM THE PRESENT CASE, THAT DECISION MUST EITHER BE HELD TO SUPPORT APPELLANTS' POSITION, OR BE OVERRULED.

As indicated in Point II., *supra*, P.L. 93-259 includes in its coverage State and local governmental employees who by no stretch of the imagination can be regarded as performing the kinds of functions performed by the employees of firms engaged in commerce. *Maryland v. Wirtz*, 392 U.S. 183, upon which Appellee mainly

[9]Cf. J. P. Crecine (ed.), *Financing the Metropolis* (Sage Publications, 1970); H. Wellington and R. Winter, *The Unions and the Cities* 17 et seq. (The Brookings Institution, 1971); R. Horton, *Municipal Labor Relations in New York City: Lessons of the Lindsay-Wagner Years* 117 et seq. (Praeger, 1973).

relies, upheld an application of the Federal Commerce Power to only public employees who performed functions identical to those of employees of private enterprises. The necessary implication of this carefully limited ruling is that the Commerce Power of the United States does not extend to the regulation of the employment terms and conditions of State and local employees whose activities differ from and do not compete with those of employees of private firms. However, if this Court holds that the Solicitor General's construction of *Maryland v. Wirtz* is correct, then due respect for the Constitution of the United States requires that *Maryland v. Wirtz* be overruled.

A. *Maryland v. Wirtz* Held That the Federal Commerce Power Extends Only to Economic Activities of State and Local Governments That Are (1) Validly Regulated by the Federal Government When Engaged in by Private Persons and (2) Competitive with Private Commercial Activity.

The issue in *Maryland v. Wirtz* was whether or not the 1966 amendments of the Fair Labor Standards Act were valid exercises of the Federal Commerce Power insofar as they extended the Act's coverage to State and local governmental employees in certain hospitals, institutions, and schools.[10] Attention to Mr. Justice Harlan's carefully structured and painstakingly guarded opinion for the majority in *Maryland v. Wirtz* will demonstrate that the decision preserved the distinction

[10]See 392 U.S. at 186-87.

between commercial activities, which are subject to an otherwise valid exercise of the Federal Commerce Power, and governmental activities, which are not.

The starting point of Mr. Justice Harlan's analysis was *United States v. Darby*, 312 U.S. 100. As Mr. Justice Harlan pointed out, "*Darby* involved employees who were engaged in producing goods for commerce."[11] He cited with approval the *Darby* holding that Congress may "by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce,"[12] but there is little need to emphasize that the "intrastate activities" thus referred to were *business* activities, not *political* activities. Neither *Darby* nor *Maryland v. Wirtz* had reference to public employees engaged in activities which neither paralleled nor competed with normal commercial activities.

Mr. Justice Harlan proceeded then to emphasize, in his discussion of *Darby*, that the Court was there "of course concerned only with the finding of a substantial effect on interstate competition . . . "[13] That obvious concern, it should be noted, was *not* with the effect on "interstate commerce" but with the effect on "interstate competition" of exempting some employees of *profit-seeking businesses* from the wage and hour provisions of the Fair Labor Standards Act. As Justice Harlan said,

> "There was obviously a 'rational basis' for the logical inference that the pay and hours of

[11]Id. at 189.

[12]Id.

[13]Id. at 187.

> *production* employees affect a company's *competitive* position.
>
> "The logical inference does not stop with production employees. When a *company* does an interstate business, its *competition* with companies elsewhere is affected by all its significant labor costs, not merely by the wages and hours of those employees who have physical contact with the goods in question . . . "[14]

There can thus be no doubt that the Court's major preoccupation in both *Darby* and *Wirtz* was with *economic* activities – whether performed by private businesses or State or local governments – which might distort the interstate *competition* which is subject to the Federal Commerce Power. If further proof of this conclusion is deemed necessary, consider the following statements from the majority opinion in *Wirtz* – all re-affirming the Court's concern with only such activities of State and local governmental employees as might be considered competitive with private interstate industry:

> " . . . [W]hile the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government *when engaged in by private persons*, the State too may be forced to conform its activities to federal regulation . . . "[15]
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> . . . .
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> "This Court has examined and will continue to examine federal statutes to determine whether

[14]Id. at 190. Emphasis supplied.

[15]Id. at 196-97. Emphasis supplied.

there is a rational basis for regarding them as regulations of commerce among the States. But it will not carve up the commerce power to protect *enterprises indistinguishable in their effect on commerce from private businesses*, simply because those enterprises happen to be run by the States for the benefit of their citizens."[16]

B. *Maryland v. Wirtz* Cannot and Should Not Be Read as Validating All Congressional Regulations of the Employment Terms and Conditions of State and Local Governments Merely Because of Their Interstate Purchases.

P.L. 93-259 rests its regulation of the wages and hours of State and local government employees on the premise that Congress has power under the Constitution to regulate all activities which affect interstate commerce. Since State and local governments make billions of dollars of purchases in interstate commerce – so the argument runs – and since of necessity such prodigious purchases must affect interstate commerce, it follows that the Federal Commerce Power extends to all the employment practices of all the State and local governments.

However, as Mr. Justice Frankfurter once remarked, "this is a bit of verbal logic from which the meaning of things have evaporated."[17] It is, moreover, a *reductio ad absurdum* of *Maryland v. Wirtz* which Mr. Justice Harlan did his best to guard against.

If the purchases in interstate commerce of the State and local governments bring validly into play against

[16]Id. at 190 Emphasis supplied.

[17]Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 191 (1941).

their employment practices the whole array of regulatory power which Congress is given by the Commerce Clause, may Congress also tell the States and localities how they must *otherwise* disburse their resources? May it tell the States and localities what the minimum and maximum prices are that they must pay for schools, police cars, roads, garbage collection, community centers, courthouses, jails, public libraries?

If the foregoing questions are answered in the affirmative, what is left of American federalism, of the idea that within the broad limits defined by Article IV, Section 4 of the Constitution of the United States, guaranteeing to every State a republican form of government, the States are self-governing political entities? This vital idea would become a frivolous myth, a mere abstraction.

An attentive reading of *Maryland v. Wirtz* will reveal that Mr. Justice Harlan did not intend any such result. Mr. Justice Douglas, dissenting, had expressed fear that the decision would be construed to permit the Federal Commerce Power to pre-empt entirely the political autonomy of the States, e.g., by forcing them "to quadruple their police forces in order to prevent commerce-crippling riots . . ."[18] Rejecting this suggestion, Mr. Justice Harlan said that it "reflects, we think, a misreading of the Act, of *Wickard v. Filburn*, *supra*, and of our decision."[19] He went on to say that

> "We uphold the enterprise concept on the explicit premise that an 'enterprise' is a set of operations whose activities *in commerce* would all be

[18]392 U.S. at 204, 205.

[19]Id. at 196-97, note 27.

> expected to be affected by the wages and hours of any group of employees . . . "[20]

Quite clearly the vast bulk of the persons employed by State and local governments – State and local police officers, firefighters, sanitation workers, bridge tenders, public school teachers and other employees, welfare workers, etc., etc. – do not fall into the "enterprise" category thus referred to by Mr. Justice Harlan. To speak of their activities as being "in commerce" would never have occurred to him, if we are to accept his opinion in *Maryland v. Wirtz* as a coherent whole.

Point III. A., *supra*, amply demonstrates what the majority had in mind in *Maryland v. Wirtz*. As shown there, the Court upheld the power of Congress to regulate the wages and hours of only a narrowly limited class of public employees: those working in governmental establishments which performed the same functions carried on by *competing* private businesses. The dominant theme of *Maryland v. Wirtz* was that Congress is constitutionally empowered to eliminate the unfair competition which State and local *enterprises* exempted from the wage and hour strictures of the Fair Labor Standards Act may wage against *private enterprises of the same kind* which are subject to those strictures.[21]

Mr. Justice Harlan could not otherwise have so confidently dismissed the fears expressed by Mr. Justice Douglas. For if the majority had meant to hold in *Maryland v. Wirtz* that the Federal Commerce Power extended to the regulation of *all* State and local governmental employment, as P.L. 93-259 virtually

[20] Id. Emphasis supplied.

[21] See text accompanying note 16, *supra*.

provides and as Appellee urges, then Mr. Justice Harlan would have had in all honesty to acknowledge the validity of Mr. Justice Douglas's doubts and fears.

This conclusion seems too clear to call for extended argument. A holding to the effect that substantial State purchases in interstate commerce subject *all* State employment to federal regulation under the Commerce Clause would similarly subject all other State disbursements and transactions to federal regulation. From the point of view of the political autonomy of the States and localities, there is no difference between employment expenditures and all others. The same inference must be drawn if one considers the class of all State disbursements from the point of view of their effects upon interstate commerce. Indeed, one may safely assume that the States and localities probably affect interstate commerce in a vastly greater degree by their purchases of materials, goods, and services than they do by their direct employment expenditures.

That being so, acceptance of Appellee's argument in this case would be tantamount to holding that the Commerce Clause, by itself, is a grant to Congress of absolute power to regulate every imaginable phase of American life. This inference follows necessarily from the fact that it is impossible to conceive of any human relationship or activity in the United States today which does not depend, directly or indirectly, upon purchases and sales which in one way or another affect interstate commerce. Consider, for example, the family, marriage, and divorce. There is no doubt that all three affect interstate commerce in a quantitatively significant degree. Does it follow from this that Congress has power under the Commerce Clause to regulate family

life, marriage, divorce, and the economic dispositions which the interested parties make with respect to them?

To repeat: Every phase and every aspect of life relates in one way or another – in any civilized society – to commerce and trade. But to hold that because this is true it follows that Congress is empowered to regulate all phases of life is a travesty of logic – and of the Constitution of the United States. It is the same as saying that because dogs breathe and human beings breathe all human beings are dogs, or all dogs are human beings.

Maryland v. Wirtz was not guilty of this logical and constitutional fallacy, and the Court should not now allow its decision there to be thus crudely distorted and misrepresented. In bringing State and local governmental employees generally within its coverage, P.L. 93-259 is a regulation of government, not a regulation of commerce. It cannot be overemphasized that no two categories of human action are more distinct than government and commerce. Confusing and confounding them, as P.L. 93-259 definitely does, poses a threat to our constitutional federalism so serious that it can scarcely be exaggerated.

C. If Appellee's Interpretation of *Maryland v. Wirtz* Is Correct, That Decision Should Be Overruled.

Appellee makes much of the refusal in *Maryland v. Wirtz* to distinguish between "state interests whether these be described as 'governmental' or 'proprietary' in

character."[22] Note is also taken of the statement by this Court in *United States v. California*, 297 U.S. 175, 183-185, to the effect that

> "The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution."

Quoted out of context and pushed to the extremities of their logical implications, the foregoing statements do indeed support Appellee's contentions. As already demonstrated herein, however (II. A., B., *supra*), these statements were made in the context of cases involving, by hypothesis, state activities of a commercial character which, moreover, competed with private commercial activities; and which, finally, were "indistinguishable in their effect on commerce from private businesses."[23] The basic requirement, explicitly recognized in both *Maryland v. Wirtz* and *United States v. California*, was that the Congressional regulation in question be an "otherwise valid regulation of commerce."[24]

Appellee's position here turns the analysis upside down and begs the question. It amounts to saying that an otherwise impermissible Congressional regulation of strictly governmental activities of the States and localities somehow becomes a valid exercise of the Commerce Power because those activities – non-commercial and noncompetitive though they may be – indirectly and to some degree affect interstate commerce.

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[22] 392 U.S. at 195.

[23] Id. at 199.

[24] Id. at 196.

If, however, this Court concludes that Appellee's construction of *Maryland v. Wirtz* is proper and necessary, the only alternative available to it compatible with the Constitution of the United States is to overrule that decision. This conclusion is rigorously dictated by three overriding considerations: the explicit command of the Constitution, the federal structure and traditions which have emerged from that explicit command, and the fatal threat to that structure and those traditions demonstrably implicit in Appellee's position.

IV.

INSOFAR AS THEY PURPORT TO REGULATE THE EMPLOYMENT PRACTICES OF THE STATE AND LOCAL GOVERNMENTS, THE FAIR LABOR STANDARDS ACT AMENDMENTS OF 1974 EXCEED THE POWERS DELEGATED TO CONGRESS BY THE CONSTITUTION, ANNIHILATE CONSTITUTIONAL FEDERALISM, AND BETRAY BOTH THE DUTY OF THE UNITED STATES GOVERNMENT TO GUARANTEE TO EACH STATE A REPUBLICAN FORM OF GOVERNMENT AND THE ONE-MAN ONE-VOTE COROLLARY OF REPRESENTATIVE GOVERNMENT.

Affirmance of the decision below will disintegrate the substance of constitutional federalism, leaving only the name. This result is rigorously determined by the theory of Appellee's case and the premise upon which the 1974 FLSA Amendments are based. *All* governmental expenditures affect interstate commerce. *No* government can operate without expenditures. Therefore all governmental activity is subject to the Commerce Clause. Such, fantastic and absurd as it may seem, is the argument which Appellee is presenting to this Court, the guardian of the Constitution.

If the Court endorses Appellee's position in this case, it will in doing so also take a long step toward insuring the demise of the States and the localities as independent, self-governing communities. There is no exaggeration in this prediction. As shown in Point B., *infra*, Congress has been and is now considering legislation which would invade the self-governing powers of the States and localities even more violently than the 1974 FLSA Amendments have done – basing these new legislative proposals, too, on the same brutal distortion of the Commerce Clause.

A review of all the relevant provisions of the Constitution will demonstrate that Congress has not only exceeded its delegated powers in this case but also positively betrayed its constitutional duties.

A. Congressional Power Over the Internal Political Operations of the States Is Confined by the Constitution to Guaranteeing Them a Republican Form of Government and to Eliminating Certain Discriminatory Practices.

The 1974 Amendments of the Fair Labor Standards Act govern the employment practices of the States and of the local governments as if there were no differences between them and private industry. This insensitivity to

the plain facts of life summarized in Point I., *supra*, is exceeded by the contempt of nearly two hundred years of constitutional history which the 1974 Amendments display.

Even before the Bill of Rights was adopted, there could be no serious doubt, as *The Federalist* explained, that the Constitution established a federal system of imperishable State governments.[25] The main body of the Constitution established in the United States Government one – and only one – power (or duty) in respect of the internal political character and activity of the States. Article IV, Section 4, provided that

> "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

Not one of the powers delegated to Congress in Article I, Section 8, can fairly be construed as justifying Congressional regulation of the States as political sovereigns, fully in control over their internal operations, subject only to the requirement that they operate on republican, representative, principles. *In re Duncan*, 139 U.S. 449, 461, expressed the general understanding when, in reference to Article IV, Section 4, it spoke of the right of the people in each State to choose their own officers for governmental administation and to pass their own laws. Congress seems prepared now to usurp

[25]See especially U.S. Const., Art. IV, Sec. 3 and Art. V. *The Federalist* No. 17 (Hamilton), Nos. 31, 32 (Hamilton), Nos. 43, 45, 46 (Madison), *et passim*.

the right of the States to govern themselves; but, as Mr. Justice Harlan declared in *Wirtz*, this Court "has ample power to prevent what the appellants purport to fear, 'the utter destruction of the State as a sovereign political entity.' "[26]

Nor may the Supremacy Clause (Art. VI) rationally be regarded as a grant of power to control the internal political operations of the States and local governments. This Clause requires only that in areas of concurrent power the States conform their laws to those of the Federal Government. *Sinnot v. Davenport*, 63 U.S. (22 How.) 227, 242.

As to the limitations on the States contained in Article I, Section 10, and in Article IV, Sections 1-2, they too do not in the slightest degree intimate power in the Federal Government to invade the internal political autonomy of the States. While they limit the power of the States in certain respects (e.g., the Contracts Clause), they concomitantly acknowledge the internal political autonomy of the States (e.g., Art. IV, Sec. 3).

There is no need to emphasize here the affirmations of the federal principle contained in the Tenth and Eleventh Amendments. However, it may be well to refer briefly to the Civil War Amendments. These Amendments did indeed grant Congress significant power over the internal political operations of the States, especially in the Second and Fifth Sections of the Fourteenth Amendment and the Second Section of the Fifteenth. Moreover, the "one-man one-vote" rule was fashioned from the First Section of the Fourteenth Amendment. *Baker v. Carr*, 369 U.S. 186, 218, 237.

[26]392 U.S. at 196.

Whatever else may be said of these Amendments, however, their main relevance in the present case lies in the relationship they bear to Article IV, Section 4, guaranteeing a republican form of government. The Civil War Amendments and the one-man one-vote rule were designed *to enhance the representative, republican, character of the State governments. They were not designed to establish in Congress a roving, unrestrained power to weaken, let alone demolish, the right of the people of the States to run their own governments.*

In arrogating to itself control over the internal operation of State and local governments, on the pretext of an exercise of the Commerce Power, Congress in the 1974 FLSA Amendments is in fact denying the States a republican form of government. Moreover, as we shall attempt next to demonstrate, if the Court countenances *this* Congressional usurpation, Congress will in all probability present the nation in short order with even more fatal threats to the survival of the States as republican, representative, forms of government.

B. If Upheld, the Fair Labor Standards Act Amendments of 1974 Would Undermine Representative Government and the One-Man One-Vote Rule as Well as Establish the Constitutional Validity of Current Congressional Proposals Which Would Further Invade the Rights of the Citizens of the Several States to Govern Themselves.

Few propositions are clearer or more widely understood than that *all* expenditures, indeed *all*

resource allocations, in the States and the localities of this country are resultants of the normal processes of what is sometimes called representative government and sometimes called popular sovereignty.[27] What is true of *all* governmental expenditures must perforce be true also of expenditures upon the wages and salaries of public servants. The Fair Labor Standards Act Amendments of 1974, in regulating the wages and hours of the vast bulk of the employees of the State and their local governments, therefore constitute a massive invasion and abridgment of the rights of the citizens of the several States and of the municipalities to govern themselves. By the same token, they betray rather than carry out the duty of the United States to "guarantee to every State in this Union a Republican Form of Government . . . " and make a mockery of the similarly oriented one-man one-vote rule.

The 1974 Amendments are freighted with an even greater menace to the federalism and the popular sovereignty which animate the United States Constitution than those already noted here. Based on the same distortion of the Commerce Clause which underlies the 1974 FLSA Amendments, bills[28] have been proposed in Congress over the last several years which would impose

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[27]See, e.g., R. Dahl, Who Governs? *Democracy and Power in an American City* (Yale Press, 1961); H. Kaufman, *Metropolitan Leadership* as quoted in N. Polsby, *Community Power and Political Theory* 127-28 (1963).

[28]E.g., H.R. 8677, 93d Cong., 1st Sess. (Introduced June 14, 1973.) For a comparison of this bill with the National Labor Relations Act, see Petro, *Sovereignty and Compulsory Public Sector Bargaining,* 10 Wake Forest L. Rev. 25, 160-62 (1974) and G.E.R.R. No. 588: AA-1-10 (1/13/75).

upon the State and local governments compulsory collective bargaining duties which in some cases go even further than the National Labor Relations Act.[29] Indeed, there are now before Congress several bills, again based on the Commerce Clause, which would force the States and municipalities, regardless of the wishes of their citizenry, to establish wages, hours, and other conditions of employment through collective bargaining, rather than through the normal American political processes of representative government.[30]

No enormous effort of the imagination is needed in order to apprehend the consequences of such laws for representative government in the States and localities. Compulsory collective bargaining would force State and local governments to share with unions the control of employment terms and conditions which has heretofore been the exclusive responsibility of the elected and appointed representatives of the citizenry of the respective governmental units. Some States have already voluntarily adopted laws of that kind.[31] In those States, whatever else one may say of such laws, at least the United States Congress has not been involved.

But if this Court decides to uphold the 1974 Amendments of the Fair Labor Standards Act as a valid exercise of the Commerce Power, that decision will

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[29]29 U.S.C. § § 151-68 (1960).

[30]E.g., S. 3294, S. 3295 (93d Cong., 2d Sess.). As to opinion on the prospects of such legislation, see G.E.R.R. No. 574: B-17 (9/30/74); G.E.R.R. No. 588: AA-1-10 (1/13/75).

[31]See U. S. Labor Management Services Administration, Bureau of Labor Statistics, Department of Labor, *Summary of State Policy Regulations for Public Sector Labor Relations* (1973).

undoubtedly be considered in Congress an anticipatory validation of the proposals now before it to extend to all the States the kind of compulsory collective bargaining laws which only a minority of the States has thus far been willing to enact.

It is not an overstatement to say that in recent times few issues have been as profoundly troublesome as those raised by the introduction of compulsory collective bargaining in government employment. The field is swarming with questions concerning the effect of collective bargaining on the Civil Service Merit System,[32] on integrity in government,[33] even on the survival of popular and governmental sovereignty themselves.[34] One common concern among the commentators is whether or not public servants should have the right to strike. Some believe they should,[35] while others believe that strikes by public servants must absolutely be prohibited,[36] if orderly government is to survive. But if the right to strike is denied public servants, then, in the opinion of some, effective collective bargaining is foreclosed – unless the organized public servants are given a strike-substitute,

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[32]Cf. U.S. Labor Management Services Administration, Department of Labor, *Collective Bargaining in Public Employment and the Merit System* (1972).

[33]Petro, *supra* note 28 at 84-90.

[34]Id. at 64-138.

[35]Cf. G.E.R.R. No. 599: G-1, H-2 (6/17/74, No. 569: B-12 (8/26/74), No. 575: F-3 (10/7/74), No. 592: A-5 (2/10/75).

[36]E.g. D. Bok and J. Dunlop, *Labor and the American Community* 334-40 (1970); Wellington & Winter, *The Limits of Collective Bargaining in Public Employment* 78 Yale L.J. 1107, 1125-26 (1969).

such as, for example, the power to compel the governmental employer to submit to arbitration.[37]

Here, however, an even greater threat to popular sovereignty emerges. Those persons chosen to arbitrate disputes between governments and their employees become, in effect, more powerful in the disposition of community resources, gain greater control of the taxing process, than the citizens and their elected representatives themselves possess. Thus, in a dispute between the City of Marquette, Wisconsin, and a union representing its policemen,[38] one of the persons selected to arbitrate the case asked:

> "... Who elected the arbitration panel of which I am a part? To whom is this panel responsible or responsive? What pressures can the citizens of the City of Marquette bring to bear on the panel? How do they express their satisfaction or dissatisfaction with the panel's decision ..."[39]

> "... With no reflection on their integrity intended, it is a simple fact that the two panel members who endorse the majority decisions are not citizens of the City of Marquette nor even of Marquette County. And yet their decision, which has very far reaching implications, and will ultimately, no doubt, result in increased taxes for the people of the City of Marquette, is final and

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[37]Cf. McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 Colum. L. Rev. 1192 (1972).

[38]Not officially reported, the dispute is described in McAvoy, *supra* note 37 at 1199, 1208.

[39]Id. at 1208, note 100.

> binding upon those people, their government and its employees."[40]

Impressed by the threat to popular sovereignty posed by compulsory arbitration of public-sector labor disputes, one New York court has recently held unconstitutional as a violation of the one-man one-vote principle a New York statute imposing arbitration in police and firefighter labor disputes.[41]

The problems posed by compulsory public-sector bargaining are multitudinous, multi-level, and profound. Conditions vary from state to state, and the States are responding to them in a wide variety of ways.[42] The kind of experimentation for which the federal system was designed is thus proceeding as it should. If the citizens of the several States are allowed to continue such experimentation, this country will have a reasonable chance of finding out whether or to what extent public-sector bargaining is compatible with orderly representative government. Results from one State to another of the adoption of different approaches, ranging from full public-sector bargaining to no public-sector bargaining at all, will provide the experience indispensable to a practical and rational resolution of the issue from State to State.

But if, encouraged by an affirmance in this Court of the decision below, Congress should intravene to impose

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[40]Id. at 1199, note 38.

[41]City of Amsterdam v. Helsby et al., G.E.R.R. No. 591: E-1 (2/3/75) (N.Y. Sup. Ct. 1974). *Compare* State *ex rel.* Fire Fighters v. City of Laramie, -- Wyo. --, 443 P.2d 295 (Wyo. 1968).

[42]Op cit. *supra* note 31.

on all the States simultaneously the same duty to bargain collectively on the terms and conditions of public employment, all the advantages inherent in the federal system will have gone for nought. Moreover, the United States Government will have betrayed and traduced the one clear duty which the Constitution imposed upon it in respect of the structure of State government: to "guarantee to every State in this Union a Republican Form of Government."

The present case thus affords this Court an opportunity to defend constitutional federalism and popular sovereignty from a series of attacks which might otherwise prove fatal to them.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74–878

THE NATIONAL LEAGUE OF CITIES, *et al.*
Appellants

v.

THE HONORABLE PETER J. BRENNAN,
SECRETARY OF LABOR OF THE UNITED STATES,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF AMICUS CURIAE ON BEHALF OF THE INTERNATIONAL CONFERENCE OF POLICE ASSOCIATIONS, URGING AFFIRMATION

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BRIEF AMICUS CURIAE ON BEHALF OF THE INTERNATIONAL CONFERENCE OF POLICE ASSOCIATIONS, URGING AFFIRMATION.[1]

[1] Pursuant to Rule 42, paragraph 2, there have been lodged with the Clerk the written consents of the counsel of National League of Cities, et al., the Attorney General of the State of California, and of the Solicitor General of the United States to the filing of this brief *amicus curiae*.

QUESTIONS PRESENTED

1) Whether state and local law enforcement agencies import significant amounts of goods through interstate commerce thereby bringing these agencies within the coverage of the 1974 Amendments to the Fair Labor Standards Act of 1938.

2) Whether strikes, work stoppages, slowdowns and other labor disputes in state and local law enforcement agencies have an impact sufficient to impede the flow of goods through interstate commerce.

INTEREST OF AMICUS CURIAE

The International Conference of Police Associations is an international organization composed of individual police organizations that have banded together for a common goal: the professionalization of the police officer. The International Conference of Police Associations is one of the largest organizations of its kind in the world and represents approximately 200,000 police officers throughout the United States, Canada, and the Panama Canal Zone.

The 1974 Amendments to the Fair Labor Standards Act of 1938 extend the Act's basic wage and hour standards to approximately 400,000 police officers of the several states and their political subdivisions. As a national representative of a substantial number of these police officers, the International Conference of Police Associations seeks to ensure that these law enforcement employees are accorded the same employment protection and advantages enjoyed by the majority of American citizens. The International Conference of Police Associations therefore supports the 1974 Amendments as being constitutional and fully applicable to the police.

ARGUMENT

1. Whether state and local law enforcement agencies import significant amounts of goods through interstate commerce thereby bringing these agencies within the coverage of the 1974 Amendments to the Fair Labor Standards Act of 1938.

Every year hundreds of millions of Federal dollars are poured into state and local law enforcement activities. In 1971, $153,956,000, and in 1972, $225,518,000 of Federal support went to state and local police departments. A substantial portion of this money every year goes directly into manpower development on the state and local level.[2] These Federal contributions to manpower development significantly impact the labor costs of state and local police departments throughout the nation.

These Federal funds are combined with money from state and local governments to purchase the goods that are essential for effective law enforcement. In 1970 state and local law enforcement agencies spent four and one-half billion dollars. This amounted to approximately three billion dollars more than was spent on any other segment of the criminal justice system.[3] These expenditures went directly or indirectly into interstate commerce. Patrol cars, helicopters, police laboratory equipment, radio equipment and other goods essential to effective law enforcement were generally obtained through interstate commerce. Every year state and local law enforcement agencies have and will continue to make substantial purchases of goods through interstate commerce.

These interstate purchases are but a part of the complex and far-reaching connections of state and local law enforcement

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[2] $22,500,000 of Federal funds went directly into manpower development in 1971 and $31,000,000 in 1972. Law Enforcement Assistance Administration, United States Department of Justice, ***Source-book of Criminal Justice Statistics*** 29 (1973).

[3] ***Id.*** 36.

agencies with interstate commerce. Modern law enforcement is a highly organized, technologically sophisticated and nationally coordinated effort.

Basic to effective law enforcement is relevant information. This information is provided and transmitted through a nationwide web of teletype cables, computer terminals and data banks. The National Crime Information Center (NCIC), operated by the Federal Bureau of Investigation, is a computerized index containing information on wanted persons and stolen property. State and local police departments have direct computer hookups with this system which ensures a constant flow and exchange of vital information on an interstate and nationwide level.

The National Law Enforcement Teletype System (LETS) enables state and local police departments to maintain constant communication in tracking down fugitives, retrieving stolen property and fighting organized crime. The Fingerprint and Criminal Identification File, the Known Professional Check Passers File (PROCHECK), and the nationwide distribution of police circulars are just a few of the many intimate connections state and local police departments have with interstate commerce.

Every year hundreds of thousands of tons of interstate freight travel across the nation's highways. This peaceful and profitable flow of interstate commerce is made possible by the efforts of thousands of state and local police officers that patrol the many miles of interstate highways criss-crossing the country.

2. **Whether strikes, work stoppages, slowdowns and other labor disputes in state and local law enforcement agencies have an impact sufficient to impede the flow of goods through interstate commerce.**

Police labor disputes, unlike other labor disruptions, have a double impact upon interstate commerce. First, the police strike or work stoppage adversely affects interstate commerce

in the same manner as any labor dispute. Second, this primary adverse effect is compounded by a consequent ineffective enforcement of state and local laws that directly interferes with the peaceful and productive flow of goods through interstate commerce.

The question of the interstate impact of police labor disputes was decisively answered by the results of the Boston police strike of 1919. Although the strike only lasted four days the results were devastating.

> "Looting of shops and stores began on the same day as the strike. The total property damage of the strike amounted to more than one million dollars, the result of pillaging and looting. The Massachusetts State Guard was summoned on September 10 to protect the City. Three persons were killed on this day when the Guard attempted to suppress a riot in South Boston."[4]

The catastrophic effects of a police strike were once again made clear a half a century later when 3700 members of the Montreal Police Department went on strike in October of 1969. Three persons were killed and one million dollars of destruction resulted from looting and vandalism.[5]

Despite these occurrences, the great sense of dedication and the commitment of police officers as true professionals have made police strikes few and far between. While strikes are atypical among police officers, other forms of labor disruptions have occurred with some frequency and with significant effects on interstate commerce. Sick calls (also known as "blue flu" or "Hong Kong flu"), mass resignation,

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[4]J. Burpo, *The Police Labor Movement: Problems and Perspectives* 4 (1971).

[5]Clark, *The Day the Police Went Away*, Los Angeles Herald-Examiner (Los Angeles), November 30, 1969, at A-3.

and attendance of professional seminars are some of the means by which police seek to achieve the minimum pay, overtime, and employment terms automatically accorded other American citizens for over three decades by the Fair Labor Standards Act of 1938. The police, through their support of the 1974 Amendments, seek to achieve what the Congress has already mandated as the bare minimum in minimum wage and overtime provisions for the American employee.

The police have traditionally been denied the minimum vehicles for ensuring, through their own efforts, the achievement of adequate pay and working conditions. As late as 1969 police officers were restricted in organizing and joining employee organizations by state statutes, municipal ordinances and departmental regulations.[6] It was not until 1968 and 1969 that Federal courts dealt a blow to state laws prohibiting formation of or membership in a public employee union.[7] Moreover, as late as 1969, only three states had binding arbitration statutes for policemen and only twenty-seven states had collective bargaining statutes that permitted direct bargaining by the police as an organization for the purpose of negotiating improved benefits.

The gradual extension of the Fair Labor Standards Act of 1938 and its amendments to virtually all sectors of the labor community except police has contributed to police labor problems. Inadequate salaries, job dissatisfactions and the lack of outlets for the satisfaction of these grievances have generated a growth in police labor activities for the past two decades.[8]

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[6] ***The Police Labor Movement, supra*** note 4, at 61.

[7] ***McLaughlin v. Tilendis,*** 398 F.2d 287, 289 (1968); ***American Federation of State, County and Municipal Employees v. Woodward,*** 406 F.2d 137 (1969).

[8] H. Juris,

Recent statistics show that police work stoppages have increased over the past twenty years. One hundred twenty-seven work stoppages occurred in the protective services (police and fire) from 1966 through 1969, compared to sixteen for 1958-1965.[9] A government employee relations report index count revealed thirteen police stoppages between May 1970 and January 1971 alone.[10]

The labor experience of the last two decades has brought a decisive message:

> "... the police, who appear to perceive themselves as doing a difficult job for relatively low economic rewards compared to civilians, will take steps to increase their rewards or reduce their efforts."[11]

[9] White, ***Work Stoppages of Government Employees,*** 92 Monthly Labor Review 29 (1969).

[10] H. Juris & P. Feuille, ***Police Unionism*** 192 (1973).

[11] ***Id.*** 23.

CONCLUSION

The International Conference of Police Associations emphatically supports the inclusion of the police under the 1974 Amendments and the constitutionality of this statute. The law enforcement agencies of state and local government have the effects on interstate commerce required by the Fair Labor Standards Act. First, state and local law enforcement agencies using their own and Federal funds make substantial purchases of goods through interstate commerce. Second, police labor disputes burden and obstruct commerce and the free flow of goods in commerce.

The 1974 Amendments do not, at this phase of their implementation, accord police the full minimum wage and overtime benefits given the vast majority of other employees covered by the Act.[12] Notwithstanding this fact, the International Conference of Police Associations firmly believes that the police are fully entitled to coverage under the Act in principle in order that the laws relating to law enforcement activities may be brought into closer agreement with the realities of those activities. One of these basic realities is that the typical police officer, contrary to the format of existing legislation, works a five day forty hour week. The existing 7(k) exemption embodies a Congressional compromise wherein the state and local governments were able to create a legal mechanism whereby the police officer will be deprived, as it now stands, of twenty hours of overtime pay during every seven day work period. Appellants now seek to deny police officers even this *pro forma* protection.

Every workday the American police officer puts his life on the line to protect his fellow citizens. As the law now

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[12]The Fair Labor Standards Act of 1938, as amended 29 U.S.C. 201 *et seq.* provides a special option for computing overtime in Sec. 7(k) that denies police overtime in a seven day period until hours in excess of 60 have been worked. With the exception of the fire fighters other non-exempt employees are entitled to overtime at one and one-half the regular rate for all hours worked over 40.

stands, state and local governments are seeking to deny the police officer what the Congress and what this Nation has considered for over three decades to be the minimum standards of fair employment. The police officer, now denied in most states the full set of negotiating tools for achieving his employment goals, has sought the aid of the Congress and of this Court. The appellants have argued that they do not have the funds to adequately compensate the police. Appellants ***must*** find these funds to accord the police officer what is already accorded virtually every other American worker.

/S/ _____

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[13]Counsel for *amicus* wishes to acknowledge the valuable assistance rendered in connection with this brief by Zane A. Lang, a third year student at the George Washington University National Law Center, Washington, D.C.

MOTION FILED

MAR 26 1975

In the Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-878 and 74-879

THE NATIONAL LEAGUE OF CITIES, ET AL.,
Appellants,

vs.

PETER J. BRENNAN, SECRETARY OF LABOR.

THE STATE OF CALIFORNIA, ET AL.,
Appellants,

vs.

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ON CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE FLORIDA POLICE BENEVOLENT ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN RESPONSE TO PETITIONS NOS. 74-878 AND 74-879, AND BRIEF AMICUS CURIAE IN SUPPORT OF PETER J. BRENNAN

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MOTION OF THE FLORIDA POLICE BENEVOLENT ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN RESPONSE TO PETITIONS NOS. 74-878 AND 74-879

The Florida Police Benevolent Association (Fla. P.B.A.) hereby respectfully moves for leave to file a brief amicus curiae in this case in support of the appellee, as

provided in Rule 42 of the Rules of the Court. The consent of the attorneys for the appellant State of California has been obtained, as has the consent of the attorneys for the appellee. The consent of the attorneys for the appellant National League of Cities was requested, but refused.

The Florida Police Benevolent Association is primarily an organization of law enforcement personnel in the State of Florida with a membership of approximately five thousand. The basic issue posed by the case is of the deepest concern to the Fla. P.B.A. and all other municipal, county and state law enforcement personnel. That issue is the constitutionality of the 1974 amendments to the Fair Labor Standards Act of 1938 (P.L. 93-259, 88 Stat. 55, amending 29 U.S.C. 201, et seq.), which include a provision dealing with compensation for overtime, applicable to certain law enforcement personnel. Accordingly, as the spokesman for one group of municipal, county and state law enforcement personnel, whose interests are similar to many other such law enforcement personnel across the country who will be affected by the outcome of this decision, the Fla. P.B.A. desires the opportunity to present its views on this matter to the Court.

Movants will necessarily concentrate on the peculiar facts of their own case. In the brief tendered with this motion, the Fla. P.B.A. treats the question of the constitutionality of these 1974 amendments to the Fair Labor Standards Act more narrowly than does the Solicitor General. Specifically, we emphasize the Tenth Amendment of the United States Constitution and demonstrate how the amendment should not be allowed to render unconstitutional federal legislation which may compel states, and their political subdivisions, to treat their employees in a fair manner. More specifically, we submit that states should not be able to utilize the Tenth Amendment as

a shield when they are reluctant to provide state-employed law enforcement personnel with state legislation protecting their labor standards, while the federal government is willing to do so through one of its delegated powers under the Constitution.

Hence, we ask leave to place before the Court a statement of our reasons for asserting that the Tenth Amendment arguments made by the petitioners in an attempt to strike these amendments as unconstitutional are a potentially hazardous area for state employees who are not protected on the state level and need protection through federal legislation in order to maintain standards in their respective areas. A brief containing such a presentation is tendered with this motion.

WHEREFORE, it is respectfully prayed that this motion for leave to file the annexed brief amicus curiae be granted.

Respectfully submitted,

HARRY LEWIS MICHAELS

BRIEF AMICUS CURIAE

QUESTIONS PRESENTED

This case presents questions which go to the very heart of this country's constitutional form of government. The issues in this case are requiring this Court to decide whether or not Congress has acted within its delegated powers when it formulated the 1974 amendments to the Fair Labor Standards Act of 1938. The questions presented necessarily include the following:

(1) Whether the Tenth Amendment is in fact a limitation upon the power of Congress to enact legislation pursuant to its constitutionally delegated power to regulate interstate commerce.

(2) Whether in this case the Tenth Amendment would limit the power of Congress to enact the 1974 amendments to the Fair Labor Standards Act of 1938 pursuant to its constitutionally delegated power to regulate interstate commerce.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant parts of the Constitution of the United States are as follows:

Article I, Section 8:

> The Congress shall have Power * * *
>
> * * *
>
> To regulate Commerce * * * among the several States * * *;

Article VI:

> * * *
>
> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Fair Labor Standards Amendments of 1974 are set forth as Appendix B to the Jurisdictional Statement of appellants National League of Cities, et al.

INTEREST OF AMICUS CURIAE

The interest of the Florida Police Benevolent Association as amicus curiae is set forth in the Association's motion for leave to file this brief amicus, to which motion this brief is annexed.

ARGUMENT

As stated in the motion for leave to file this brief amicus, the Florida Police Benevolent Association (Fla. P.B.A.) has necessarily taken a more narrow approach to the various questions presented in this cause. Due to the nature of their organization, the Fla. P.B.A. is primarily interested in the provision in the 1974 amendments to the Fair Labor Standards Act which relates to overtime compensation for law enforcement personnel after they have worked a certain number of hours in a prescribed period of time. However, again necessarily, the arguments

presented in this brief apply to the constitutionality of all of the 1974 amendments.

The primary position taken by the Fla. P.B.A. is that the Tenth Amendment of the United States Constitution is not a limitation upon the extent to which the delegated powers of the federal government can be exercised. Although the Tenth Amendment must be scrutinized in conjunction with one of the enumerated powers before it is relevant, the Fla. P.B.A. is of the opinion that a clear and concise delineation of the role of the Tenth Amendment in cases involving constitutional questions previously before this Court will be helpful in the disposition of the consolidated case now before the Court.

In essence, the Fla. P.B.A. takes the position that successful use of Tenth Amendment arguments by states or their political subdivisions, in cases where the federal government has seen the need to act under one of its delegated powers from the Constitution of the United States, would result in a deprivation of protective legislation which the federal government is constitutionally permitted to enact.

I. The Tenth Amendment

The Tenth Amendment, as adopted in 1791, provides as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Ever since its proposal by the first Congress and its ratification by the states as part of the Bill of Rights, the Tenth Amendment has never been viewed as a limitation upon the delegated powers of the federal government, but rather as a reiteration of what was already

provided in the Constitution. James Madison, speaking in Congress during the debates which prefaced the Tenth Amendment, said:

> I find, from looking into the amendments proposed by the state conventions, that several are particularly anxious that it should be declared in the Constitution, that the powers not therein delegated should be reserved to the several states. Perhaps other words may define this more precisely than the whole of the instrument now does. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it.
>
> I Annals of Congress, 441

The initial intention of the Tenth Amendment was quite clearly not meant to be a limitation upon Congress to act within the scope of the powers delegated to the United States by the Constitution. The subsequent decisions of this Court have not modified to any extent the intention of those who drafted this amendment. In *United States* v. *Darby,* 312 U.S. 100, 124 (1941), a case dealing, as this one does, with the constitutionality of the Fair Labor Standards Act of 1938, this Court summarized its view of the Tenth Amendment:

> From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.

The Court then cited the following decisions as authority for its view of the Tenth Amendment: *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 324, 325 (1816); *McCul-*

loch v. *Maryland*, 4 Wheat. 316, 405, 406 (1819); *Gordon* v. *United States*, 117 U.S. Appendix 697, 705 (1864); *Lottery Case* (*Champion* v. *Ames*), 188 U.S. 321 (1903); *Northern Securities Co.* v. *United States*, 193 U.S. 197, 344, 345 (1904); *Everard's Breweries* v. *Day*, 265 U.S. 545, 558 (1924); *United States* v. *Sprague*, 282 U.S. 716, 733 (1931).

Since the *Darby* decision in 1941, this Court has consistently construed the Tenth Amendment to be no more than what the Constitution as a whole provides, and as such is not a limitation in any sense upon the delegated powers of the federal government. The Court has maintained this position in cases dealing with the Commerce Clause of the Constitution (Art. I, Sec. 8), as well as in other cases where activity within a state was constitutionally regulated under another power delegated to the federal government, and not in violation of the Tenth Amendment.

In *Fernandez* v. *Wiener*, 326 U.S. 340 (1945), a case dealing with the estate tax on community property, this Court held that the Tenth Amendment did not operate as a limitation upon the powers, express or implied, delegated to the national government. One year later, in *Case* v. *Bowles*, 327 U.S. 92 (1946), a case dealing with the Emergency Price Control Act, the Court faced the constitutional issue of whether Congress had exceeded the scope of its delegated powers in enacting the legislation in question. The Court resolved the issue, in light of the Tenth Amendment, by stating:

> Since the decision in *McCulloch* v. *Maryland* * * * it has seldom if ever been doubted that Congress has power in order to attain a legitimate end—that is, to accomplish the full purpose of a granted authority—to use all appropriate means plainly adapted to that end, unless inconsistent with

> other parts of the constitution. And we have said, that the Tenth Amendment "does not operate as a limitation upon the powers, express or implied, delegated to the national government." [*Case* v. *Bowles*, supra, 327 U.S. at 102.]

More recently, in *United States* v. *Oregon*, 366 U.S. 643 (1961), this Court dealt with the Tenth Amendment question in relation to a federal statute concerning the devolution of property which conflicted with an Oregon statute on the same subject. The Court held that the federal statute prevailed, and stated that:

> Although it is true that this is an area normally left to the states, it is not immune under the Tenth Amendment from laws passed by the Federal Government which are, as is the law here, necessary and proper to the exercise of a delegated power. [*United States* v. *Oregon*, supra, 366 U.S. at 644.]

In *Sperry* v. *Florida*, 373 U.S. 379 (1963), a patent practice case, this Court held that since Congress had acted within its delegated powers, delegated to the United States by the Constitution, it had not exceeded the limits of the Tenth Amendment even though the federal legislation would have concurrent effects upon a matter which would otherwise be within the control of the state.

Finally, in the last case to deal with the constitutionality of amendments to the Fair Labor Standards Act of 1938, this Court, in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), held that since *Sanitary District of Chicago* v. *United States*, 266 U.S. 405 (1925), there was no longer any question about whether state concerns "outweighed" the importance of a constitutionally valid federal statute under the powers delegated to Congress. They do not.

II. The Commerce Clause

As stated earlier, Tenth Amendment arguments are not based solely upon the Tenth Amendment. There must be an exercise of a power by the federal government which is being questioned by a state as to whether the power is within the scope of those powers delegated to the federal government by the Constitution. In this case, the appellants claim that the 1974 amendments to the Fair Labor Standards Act of 1938 are not within the Commerce Power of the Constitution. The brief submitted by the Solicitor General in support of the appellee Peter J. Brennan, Secretary of Labor, comprehensively and conclusively deals with this aspect of the case. The Fla. P.B.A. asks only that its brief amicus be read in conjunction with the Solicitor General's brief. The questions arising under the Tenth Amendment and the Commerce Clause necessarily dovetail to form the primary issue in this case.

III. Valid Exercise of the Commerce Clause by the Federal Government Precludes Any Tenth Amendment Arguments on the Part of the States

The constitutional question in these consolidated cases involves whether or not the interstate commerce power of Congress has been exceeded by the 1974 amendments to the Fair Labor Standards Act of 1938. This question is not affected by the Tenth Amendment because the Tenth Amendment has consistently been construed as not being a limitation upon any of the powers delegated to the federal government by the Constitution of the United States.

Justice Story enunciated probably the most succinct comment on the Tenth Amendment when he stated that, "The amendment states but a truism that all is retained which has not been surrendered." *United States* v. *Darby*, supra, 312 U.S. at 124. A corollary of this statement

is that those powers which have been surrendered by the states to the federal government are wholly surrendered, and the Tenth Amendment in no way mitigates this fact. This rule holds true even where there is conflicting legislation between the states and the federal government. As pointed out in *Case* v. *Bowles*, supra, there is no general implied doctrine that the national and state governments must exercise their respective powers so as not to interfere with each other. By virtue of the Supremacy Clause of the Constitution (Article VI, Clause 2), valid federal legislation takes precedence over any existing state legislation on the same topic, and also the power of the state to legislate in that particular area subsequent to the federal legislation.

Professor Cowen summarized this exact issue very comprehensively when he stated in *What Is Left of the Tenth Amendment*, 39 N. C. L. Rev. 154, 173 (Jan. 1961):

> By implied prohibition the states are precluded from regulating interstate commerce. Nevertheless they may exercise their normal powers, primarily the police power and the power to tax, until such time as a superior federal power is asserted. Then the state power yields. But this is not an invasion of reserved powers. The powers delegated to the United States are superior to the powers of the states. They are complete and sufficient to achieve the ends for which the Constitution was created. In view of the broadened scope of the commerce power, effected by activity participated in by the executive, legislative and judicial branches of the federal government, it seems safe to predict that the tenth amendment will never again be successfully used to nullify an act of Congress based on the commerce power. [Citations omitted.]

CONCLUSION

The constitutional arguments presented by the appellants, especially their Tenth Amendment argument, have already been examined and discarded by this Court in the cases cited above. The Tenth Amendment of the Constitution of the United States should not be construed to be more than it actually is. The Tenth Amendment was not intended to be and has not been construed as a limitation upon the powers delegated to Congress by the Constitution of the United States, and in this case is not a limitation upon the power of Congress to legislate in the area of interstate commerce. The judgment of the district court should be affirmed.

Respectfully submitted,

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Nos. 74-878, 74-879

Supreme Court of the United States

OCTOBER TERM, 1974

THE NATIONAL LEAGUE OF CITIES, ET AL., *Appellants*

v.

JOHN T. DUNLOP, Secretary of Labor

THE STATE OF CALIFORNIA, *Appellant*

v.

JOHN T. DUNLOP, Secretary of Labor

On Appeals from the United States District Court for the District of Columbia

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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This brief *amicus curiae,* in support of the position of John T. Dunlop, Secretary of Labor, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AFL-CIO

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 111 national and international labor unions that have approxi-

mately 13,500,000 members. The following AFL-CIO unions, among others, represent employees of state and local governments covered by the 1974 amendments to the Fair Labor Standards Act: Communication Workers of America (10,000 public employee members); International Union of Operating Engineers (30,000 public employee members); International Association of Fire Fighters (155,000 public employee members); Laborers International Union of North America (80,000 public employee members); International Brotherhood of Painters and Allied Trades of the United States and Canada (10,000 public employee members); United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (25,000 public employee members); Seafarers International Union of North America (10,000 public employee members); Service Employees International Union (200,000 public employee members); American Federation of State, County and Municipal Employees (700,000 public employee members); American Federation of Teachers (425,000 public employee members); Amalgamated Transit Union (50,000 public employee members).

The AFL-CIO, has determined to participate in this case for two basic reasons. First, and most obviously, the Federation's affiliates are the freely selected representatives of scores of public employees directly affected by the 1974 amendments, the validity of which is at issue here. The AFL-CIO therefore supported the 1974 amendments in the vigorous debate that surrounded their consideration and eventual adoption by the Congress. We have concluded that we would be derelict in our duty to these members if we were to abandon the matter now that the appellants have transferred their opposition from the Legislative Branch to this forum.

Second, it is the conviction of the AFL-CIO that working men and women, whether employed by a private or public employer, and whether they have chosen to be represented in dealing with their employer or not, deserve a living wage for their labor. Yet, in 1973 approximately 409,000 State and local government employees were paid less than $1.90 an hour [1]—at a time when the poverty level income for an urban family of four was $4,540 or approximately $2.27 an hour.[2] That is a national disgrace which fully warranted the national corrective enacted by Congress.

ARGUMENT

In these cases the appellants challenge Congress' constitutional authority pursuant to the commerce power to establish a minimum wage, and a maximum limit of hours unless overtime wages are paid, for public employees (other than executives, administrators, professionals, elected officials and their personal staffs, policymaking appointees and immediate advisors) who work in enterprises in commerce.

The most casual consideration reveals three flaws in the appellants' analysis of the Commerce Clause, each of which, we believe, is fatal to their position. Since the Secretary of Labor's brief exposes these defects in the appellants' case in some detail, we merely note them here. Further, it is our view that the appellants are wrong also in the very premise from which they start—that the Constitution reserves to the States a greater authority to set the term and conditions of public employees than to legislate on that

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[1] See Background Materials on the Fair Labor Standards Act Amendments of 1973, 93d Cong., 1st Sess., p. 220; H. Rept. 93-913, 93d Cong., 2d Sess., p. 28.

[2] S. Rep. 93-690, 93d Cong., 2d Sess., p. 8.

subject with regard to employees in the private sector working within their borders. We devote the second portion of our argument to a discussion of that error showing first that no explicit provision of the Constitution supports that premise and second that the Supremacy Clause squarely refutes it. Finally, the appellants make much of the supposed hardships visited on the States by the federal requirement that firefighters be paid overtime. Since the International Association of Fire Fighters is one of the international unions that makes up the AFL-CIO we believe it appropriate to conclude by responding to those false alarms.

(a) The appellants' conception of the extent to which the States are subject to Congress' power to regulate commerce is contrary to the uniform teachings of this Court, as Mr. Justice Harlan demonstrated in the most recent case in point, *Maryland* v. *Wirtz,* 392 U.S. 183, 195-196, 196-197, 198-199:

> "It is clear that labor conditions in schools and hospitals can affect commerce. The facts stipulated in this case indicate that such institutions are major users of goods imported from other States * * *. Strikes and work stoppages involving employees of schools and hospitals, events which unfortunately are not infrequent, obviously interrupt and burden this flow of goods across state lines. It is therefore clear that a rational basis exists for congressional action prescribing minimum labor standards for schools and hospitals, as for other importing enterprises.
>
> * * *
>
> "The Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as governmental or proprietary in character. As long ago as Sanitary District v. United States, 266 US 405, the Court put to rest the contention that state concerns might consti-

> tutionally outweight the importance of an otherwise valid federal statute regulating commerce.
>
> * * *
>
> "While the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation. This was the unanimous decision in United States v California, 297 US 175." (Footnote omitted.)

(b) Contrary to appellants, these precedents do not sanction a federal usurpation of authority reserved to the States, they embody the only rule consistent with the original understanding of the grant to Congress of the "Power * * * to regulate Commerce * * * among the several States * * *." As Chief Justice Hughes stated in *Labor Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 36-37:

> "The Congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement'; to adopt measures 'to promote its growth and insure its safety': 'to foster, protect, control and restrain.' That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that com-

merce from burdens and obstructions, Congress cannot be denied the power to exercise that control." (Citations omitted.)

And as the Court added in *Polish National Alliance* v. *Labor Board*, 322 U.S. 643, 648:

> "Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce."

The upshot is that:

> "This broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it is an affimative power commensurate with the national needs. It is unrestricted by contrary state laws or private contracts. And in using this great power, Congress is not bound by technical legal conceptions. Commerce itself is an intensely practical matter. Swift & Co. v. United States, 196 U.S. 375, 398. To deal with it effectively, Congress must be able to act in terms of economic and financial realities. The commerce clause gives it authority so to act." (*North American Co.* v. *Securities & Exchange Commission*, 327 U.S. 686, 705).

Looking to the "economic and financial realities" we find that state and local government purchases have grown to approximately 13% of the gross national product;[3] that the federally financed portion of their budgets has grown

[3] 119 Cong. Rec. S. 14057 (daily ed.), (July 19, 1973).

to roughly 26%;[4] that their workforce has grown to 14% of all employees;[5] that a significant number of these employees have been paid a below poverty level wage and/or required to work overtime;[6] that there has been a secular increase in the number of state and local government work stoppages;[7] and that the society is suffering from inadequate consumer purchasing power and from a failure to adequately distribute available work even in the face of serious unemployment.[8]

If these facts are evaluated from the standpoint that "commerce itself is an intensely practical matter" (*North American Co., supra*) and "that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement'; to adopt measures 'to promote its growth and insure its safety'; 'to foster, protect, control and restrain' " (*Jones & Laughlin, supra*), then the conclusions that follow are: first, that the payment of less than the minimum wage and the requirement that excess hours be worked at enterprises in commerce are detrimental to the free flow of commerce; second, that substandard working conditions have the same detrimental effect on commerce whether they occur at private or public enter-

[4] Executive Office of the President, Office of Management and Budget, Special Analyses, Budget of the United States Government, p. 205.

[5] U.S. Dept. of Commerce, Bureau of Census, Public Employment in 1973, p. 9.

[6] Background Material on the Fair Labor Standards Act Amendments of 1973, 93d Cong., 1st Sess., p. 220; H. Rep. No. 93-913, 93d Cong., 2d Sess., p. 28.

[7] U.S. Dept. of Labor, Bureau of Labor Statistics, Work Stoppages In Government, Report 434, Table 1.

[8] S. Rep. No. 93-690, 93d Cong., 2d Sess., pp. 9, 12, 24.

prises in commerce; and, third, that Congress has, therefore, been granted authority to alleviate these conditions at all such enterprises.

(c) The appellant State of California recognizes that state and local governments are not "totally immune" from federal regulation under the Commerce Clause and seeks to import into this area from the cases dealing with the taxing power the governmental-proprietary distinction discussed in *New York* v. *United States,* 326 U.S. 572. (Cal Br. 25-26) Assuming, contrary to this Court's decisions (see pp 4-6 *supra*), that this distinction is relevant here there are two reasons why its application does not avail appellants.

First, here, as in *Maryland* v. *Wirtz,* the Act does not touch the States' relationships with those employed as policy makers, executives, professionals or administrators; it reaches only public employees whose duties are essentially the same as their counterparts in private industry. (See 392 U.S. at 193).

Second, here again, as in *Maryland* v. *Wirtz*:

> "The Act establishes only a minimum wage and a maximum limit of hours unless overtime wages are paid, and does not otherwise affect the way in which [state functions] are performed. Thus appellants' characterization of the question in this case as whether Congress may, under the guise of the commerce power, tell the States how to perform their * * * functions is not factually accurate. Congress has "interfered with" these [state] functions only to the extent of providing that when a State employs people in performing such functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, * * *." (392 U.S. at 193-194)

The cash nexus between employer and the employees covered by this Act can not by any stretch of the imagination be said to be a "State activit[y] * * * that partakes of uniqueness from the point of view of intergovernmental relations," (*New York* v. *United States,* 326 U.S. at 582).

The only concrete particular in which it has been suggested that federal regulation of the economic relationship between a public employer and its employees differs from regulation of the same relationship in the private sector is that the former may "disrupt the fiscal policy of the States and threaten their autonomy." (*Maryland* v. *Wirtz,* 392 U.S. at 203 (Douglas, J., dissenting).) But, as Mr. Justice Douglas has more recently observed:

> "Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States." (*Employees* v. *Missouri Public Health Dept.,* 411 U.S. 279, 284.)

The highest of the appellants many extravagant cost estimates for the 1974 amendments is 1 billion dollars. (NLC Br. p. 119.) But there is no doubt that the amount of federal *assistance* to the States is 52 billions. The total picture is hardly one of a federal government intent on economic strangulation of the States. Indeed, while the appellants are long on prophecies of impending financial catastrophies that could be visited on the States by Congress acting pursuant to the commerce power as stated in *Maryland* v. *Wirtz,* the decisive point is that the 1966 FLSA amendments have been in effect for 8 years, the States have had an ample opportunity to demonstrate that those amendments have undermined the administration of those institutions but

have not been able to do so. To the contrary, the best evidence demonstrates that "Overall it can be stated that the education and hospital sectors have had little evident difficulty adjusting to the minimum wages established by the 1966 Amendments." (S. Rep. No. 92-842, 92d Cong., 2d Sess., p. 19.)

The arguments of the appellants presuppose that if the commerce power were to be limited as they propose the States would be autonomous masters of their fiscal fortunes. That supposition would probably have been a romantic illusion even in 1790. It certainly bears no relation to reality today. The principal determinants of the economic situations of the cities and states are the decisions of how the national economy is to be managed, who is to be taxed by the federal government and how much, and the proportion if any of the resulting federal revenues that are to be granted to the cities and states. As those who replaced the Articles of Confederation with the Constitution intended, these decisions are made by Congress, which is their chosen instrument for exercising "the vast expanse of federal authority over the economic life of the new nation" (*Maryland* v. *Wirtz*, 392 U.S. at 196). No matter how much may remain of the intergovernmental tax immunity doctrine (and it should be remembered that *New York* v. *United States*, *supra* affirmed the tax levied) there can be no doubt that as to all other aspects of the economy the taxing power of Congress is paramount. Thus, if the source of the diminition of state control of fiscal affairs inherent in our Constitution must be identified it is the Sixteenth Amendment. And, of course, the courts lack both the authority and capacity to police the federal taxing and fiscal powers on behalf of the States. The aim of returning to the States the complete

control of their fiscal affairs they had possessed in 1786 is a mirage: That is an end obtainable only by destroying the system the States created in adopting the Constitution.

2. (a) The discussion thus far establishes that there is no implicit limitation inherent in the Commerce Clause itself which would bar the application of the FLSA to public enterprises in commerce. It is equally plain that the one explicit provision of the Constitution upon which the appellants rely, the Tenth Amendment, can not be used to justify the result they seek. As a unanimous Court explained in *Sperry* v. *Florida Bar*, 373 U.S. 379, 403:

> "Congress having acted within the scope of the powers 'delegated to the United States by the Constitution,' [there the power to grant patent rights] it has not exceeded the limits of the Tenth Amendment despite the concurrent effects of its legislation upon a matter otherwise within the control of the State. 'Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States.' II Annals of Congress 1897 (remarks of Madison). The Tenth Amendment 'states but a truism that all is retained which has not been surrendered.' United States v. Darby, 312 U.S. 100, 124; Case v. Bowles, 327 U.S. 92, 102. Compare Leslie Miller, Inc. v. Arkansas, 352 U.S. 187. The authority of Congress is no less when the state power which it displaces would otherwise have been exercised by the state judiciary rather than by the state legislature."

And *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, shows that the scope of the Tenth Amendment is no greater when the claim is that there has been an interference with

state personnel policies. There the State challenged a determination by the Civil Service Commisison made pursuant to§ 12(a) of the Hatch Act[8] that an Oklahoma Highway Commissioner had violated that Act's restrictions on political activity and that the violation warranted his removal. The State instituted review proceedings in the federal courts, and those proceedings ended in a determination by this Court upholding the Commission's action and rejecting the State's Tenth Amendment claim:

> "Petitioner's chief reliance for its contention that § 12(a) of the Hatch Act is unconstitutional as applied to Oklahoma in this proceeding is that the so-called penalty provisions invade the sovereignty of a state in such a way as to violate the Tenth Amendment by providing for possible forfeitures of state office or alternative penalties against the state."
>
> • • •
>
> While the United States is not concerned and has no power to regulate local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed.
>
> "The Tenth Amendment does not forbid the exercise

[8] Section 12(a) provided, in essence, that "no officer • • • of any State • • • agency whose principle employment is in connection with any activity which is financed in whole or in part by loan or grants made by the United States • • • shall • • • take any active part in political management or political campaigns." Section 12 (b) provided that if the Commission after hearing determined that a violation of §12(a) had occurred, it might determine that the violation is such that it "warrants the removal of the officer" and provided further that "if the officer . . . has not been removed from his office • • • within thirty days after notice of [such] determination • • • the Commission • • • shall make • • • an order requiring [the withholding] from its loan or grants . . . [of] an amount equal to two years' compensation at the rate such officer . . . was receiving at the time of such violation."

> of this power in the way that Congress has proceeded in this case. As pointed out in United States v. Darby, 312 U.S. 100, 124, the Tenth Amendment has been consistedly construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship. So even though the action taken by Congress does have effect upon certain activities within the state, it has never been thought that such effect made the federal act invalid." (330 U.S. at 142-143, footnotes omitted.)

The Court thus sustained a federal regulation directly affecting State employees who perform a wide range of functions, and which, by restricting those employees' political activity, intrudes far more directly on State concerns than does the FLSA.

To be sure, as the National League of Cities brief (at pp. 92-94) stresses, narrowly read, *Oklahoma* upholds only Congress' right to "fix the terms upon which its money allotments to the state[s] shall be disbursed," and we agree that power is even broader than the commerce power. But it does not follow that *Oklahoma*'s discussion of the impact of the Tenth Amendment is not controlling in this context as well. For, the Court cite and follow the construction of the Tenth Amendment articulated in *United States* v. *Darby,* 312 U.S., at 124 and, of course, *Darby* upheld Congress' authority under the Commerce Clause to enact the original FLSA, overruling *Hammer* v. *Dagenhart,* 247 U.S. 251. (Cf. Cal. Br. 31.) Moreover, this Court has been no less uncompromising in its insistence that the Tenth Amendment does not limit federal laws otherwise valid under the Com-

merce Clause because they displace state rules regulating public employees. In *California* v. *Taylor*, 353 U.S. 553, 568, the Court stated:

> "Finally, the State suggests that Congress has no constitutional power to interfere with the 'sovereign right' of a State to control its employment relationships on a state-owned railroad engaged in interstate commerce. In United States v. California (US) supra, this Court said that the State, although acting in its sovereign capacity in operating this Belt Railroad, necessarily so acted 'in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government.' • • • That principle is no less applicable here."

In short, the commerce power like the power "to fix the terms upon which [Congress'] money allotments to the state[s] shall be disbursed," is not limited by the Tenth Amendment.

(b) The cases just cited demonstrate that the concept of federalism set out in the Constitution provides for the resolution of the occasional clash of sovereignties which is inherent in a federal system by subordinating *all* state enactments, which are inconsistent and incompatible with a federal enactment passed by Congress, pursuant to a plenary authority granted to it, to the paramount federal law. This conclusion is the only one which gives proper scope to the Supremacy Clause.

The logic of the appellants' position is that our constitutional system recognizes two forms of state sovereignty, different in kind. The first is that manifested in enactments governing the State's private citizens and state activities which are "proprietary" rather than "governmental." The appellants do not contest the proposition that such

enactments are subject to displacement by superior federal law. So far as we can understand the only manifestation of the second and "higher" form of sovereignty claimed to be beyond otherwise plenary federal authority is enactments regulating the States' relations with their employees who perform "governmental" functions.

This two level theory of the Supremacy Clause is without support in either precedent or reason. The image invoked by the State of California is that in enacting the 1974 amendments "Congress has intruded into the very halls of the legislatures of the sovereign States regulating the mode and method of compensation of their employees." (Cal. Br. p. 21.) That image has a certain rhetorical force because it invokes Mr. Justice Frankfurter's preclusion of federal taxation of the statehouse in *New York* v. *United States*, 326 U.S. at 582, and more significantly because a state legislature in session passing the laws that regulate activities within that jurisdiction is the paradigm of sovereignty in action. As the National League of Cities correctly observes "Governments are bundles of law powers." (NLC Br. p. 56.) But, as Mr. Justice Black explained in *Case* v. *Bowles*, 327 U.S. 92 (where the Court upheld the application of the Emergency Price Control Act, enacted pursuant to the War Power Clause, to sales by the State of Washington of timber grown on state land; the proceeds of said sales to go for the support of the public schools), the precise purpose of the Supremacy Clause is to sanction Congressional "intrusion into the very halls of the [State] legislatures" so long as that intrusion is predicated on a power enumerated in the Constitution, and even though the result is to displace the State's judgment as to how it wishes to order its internal governmental affairs:

"[O]ur only question is whether the state's power to make the sales must be in subordination to the power of Congress to fix maximum prices in order to carry on war. For reasons to which we have already adverted, an absence of federal power to fix maximum prices for state sales or to control rents charged by a state might result in depriving Congress of ability effectively to prevent the evil of inflation at which the Act was aimed. The result would be that the Constitutional grant of the power to make war would be inadequate to accomplish its full purpose. And this result would impair a prime purpose of the federal government's establishment.

"To construe the Constitution as preventing this would be to read it as a self-defeating charter. It has never been so interpreted. Since the decision in M'Culloch v. Maryland, 4 Wheat (US) 316, 420, it has seldom if ever been doubted that Congress has power in order to attain a legitimate end—that is, to accomplish the full purpose of a granted authority—to use all appropriate means plainly adapted to that end, unless inconsistent with other parts of the Constitution. And we have said, that the Tenth Amendment "does not operate as a limitation upon the powers, express or implied, delegated to the National Government.

"Where as here, Congress has enacted legislation authorized by its granted powers, and where at the same time, a state has a conflicting law which but for the Congressional Act would be valid, the Constitution marks the course for courts to follow. Article VI provides that "The Constitution and the Laws of the United States . . . made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ." (327 U.S. at 102; footnotes omitted.)

Since "Governments are bundles of law powers" (NLC Br. p. 56), the use of those powers, and not the actions of

state employees in "operating airports [or] public housing" (NLC Br. p. 51), is the essential expression of the States as "Governments *qua* Governments" (NLC Br. p. 58). Thus, it turns the Supremacy Clause on its head to read the Constitution as sanctioning the overriding of the States' legislative powers to regulate commerce but as not contemplating the supremacy of federal law where the States act not "*qua* Government" but *qua employer*.

3. Throughout the legislative deliberations on the 1974 amendments the coverage of fire fighters was a major concern. Indeed, at the first set of hearings held by the Senate Labor Committee in 1971 on a bill which was ultimately to become the 1974 amendments,[9] testimony was presented regarding the abusive work schedules imposed on fire fighters and their substandard wages in various parts of the country. Brought to Congressional attention was the 96 hour duty week of certain fire fighters in the State of California and the 72 hour duty week of all fire fighters employed by the United States Department of Defense. Congress was also made aware of hourly wage rates for fire fighters ranging as low as $1.22 an hour.[10] It is difficult to imagine a service more directly related to commerce and more essential to the free flow of commerce than fire-fighting. The necessity of uninterrupted fire supression and control services is vividly illustrated by the effects of the fire which cripped a major portion of New York's telephone

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[9] Both Houses of Congress passed FLSA amendments in 1972 but the House of Representatives refused to go to conference with the Senate. In 1973, Congress passed but the President vetoed FLSA amendments.

[10] Hearings on S. 1861 and S. 2259 before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 92nd Cong., 1st Sess., pt. 1 at p. 366.

service for several weeks. And, public, non-federal fire-fighting agencies are responsible for fire control, for example, at the airports in and around New York. Local fire fighting agencies have responsibility for fire control at each United States Post Office, exclusive of those on Federal reservations. With this background, Congress concluded that the minimum wages and maximum hours of governmental fire fighters were subject to regulation under the commerce power and that these needed the protection of the FLSA as much as privately employed fire fighters who have been covered by the law since its inception. See *Armour & Co.* v. *Wantock,* 323 U.S. 126.

(a) The appellants seek to overturn that Congressional judgment of the strength of the claim that the 1974 amendments severely impede, if not prohibit, the practice engaged in by many public-spirited citizens of providing voluntary services to states and local governments. Indeed, the estimated cost impact presented to this Court by appellants is based in large measure on an assumption that approximately 1 million volunteer fire fighters will become subject to the FLSA.[11] Nothing could be further from the truth. As early as 1973, during the legislative debate on what was to become the 1974 amendments, Senator Williams was asked about the coverage of volunteer fire fighters during a colloquy with Senator Roth of Delaware:

> "MR. ROTH. In a number of states, including the state of Delaware, we have a system of volunteer firemen. They get no basic compensation but they do get certain indirect benefits, commonly known as fringe

[11] Appellants often cited cost impact of "billions" of dollars is premised solely on an irrational expectation that 1 million volunteer fire fighters will suddenly become employees at an annual cost of 4.5 billion dollars.

benefits. In the case of Delaware, they have certain insurance coverage. I am not certain about other States, but it is my understanding that this legislation would in no way affect that arrangement. Would the Senator care to comment?

"MR. WILLIAMS. I have had an opportunity to discuss this with the Senator from Delaware. The volunteers are described as true volunteers and, as such, they would not be considered employees and, therefore, not covered under the law or under this bill.

"The committee report did speak to this in an analogous area when we stated that the committee did not intend to extend the Fair Labor Standards Act coverage to those persons to whom tangible benefits are of secondary signficance. We are dealing with programs in the Federal establishment where the basic reason for the activity is voluntary, such as the Peace Corps, and so forth.

"Where the purpose is not employment but voluntary service, the incidentals will not necessarily carry these individuals from the volunteer service into employment. It would depend on the facts.

"MR. ROTH. I thank the senator for his comments. In closing I wish to say that the system of volunteer firemen is an outstanding success and I would hate to see anything jeopardize it.

"MR. WILLIAMS. Yes, and I think of fire companies, rescue squads, and others. Many are volunteer services and we are grateful." (119 Cong. Rec. S 14055 (daily ed., July 19, 1973.)

Consistent with the Congressional intent the Labor Department's regulations clearly exempt volunteers from coverage. This exemption is consistent also with 30 years of regulatory experience under which the Department of Labor has

exempted "volunteers" in other instances, e.g. Red Cross volunteers.

(b) Appellants assert further that the Secretary of Labor violated due process of law by failing timely to inform state and local governments of his intention to include sleep and meal periods in the calculation of hours of work of fire fighters. Appellants feigned surprise flies in the face of the legislative history of the 1974 amendments. A brief chronological recital is in order.

In 1973, Congress passed FLSA amendments which would have eventually required overtime pay for fire fighters after forty hours per week or 160 hours in a 4 week period. The exclusion of sleep and meal periods was explicitly authorized in S. Rep. No. 93-300, 93d Cong., 1st Sess., pp. 26-27, which noted the applicability of standard Department of Labor regulations on determining "hours of work." As noted above, this legislation, however, was vetoed.

In 1974, Congress passed the FLSA amendments before the Court. This time, in response to assertions by state and local government representatives that the standard workweek for fire fighters was 56 hours, the legislation required overtime pay after 60 hours in a week (240 hours in a 28-day period) phasing downwards eventually to 54 hours per week (216 hours in a 28-day period). (See § 7(h) of the FLSA as amended.) In the conference report, Congress made clear its intent that the Labor Department's standard hours of work regulations (under which sleep and meal time would have been excluded) would no longer be applicable. (See H. Rep. No. 93-953, 93rd Cong., 2nd. Sess., p. 27.)

Finally, on May 14, 1974, the Department of Labor issued a notice of its intent to interpret "on duty" time for fire fighters and police as inclusive of sleep and meal time for

minimum wage purposes (at that time only the minimum wage provisions of the law were applicable to fire fighters and police). (39 F. R. 17596.) This interpretation is clearly consistent with the intent of Congress and is mandated by legislative history. It is also clear that this interpretation is consistent with established practice in most fire departments,[12] and has been the interpretation applied by appellants in calculating their cost estimates in their Congressional testimony.

Against this background, it is clear that appellants claim of "surprise" is contrived to add to the superheated atmosphere they have sought to create as a substitute for rational analysis.

(c) Appellants' principal assertion of cost impact is made with respect to the Act's overtime requirements. The National League of Cities brief (at p. 11) estimates an additional cost of 200 million for fire protection services. This figure is most certainly an imaginary horrible. For, under Section 7(k) of the Act, as already noted, no overtime compensation is required unless the employees work an average of over 60 hours per week in any 28 day period. And appellants themselves recognize that only 15% of the public fire protection agencies (and about 10% of firefighting personnel) work in excess of 60 hours per week. Appellants' own calculation of the estimated overtime costs for these agencies is 30 million for the first year (II App., p. 628)—which

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[12] Although appellants seek to create new facts before this Court, Chief Michael T. Mitchell, Los Angeles Fire Department, representing both appellant National League of Cities and appellant National Governors' Conference testified at the June 1974 hearings of the Department of Labor that typically, on duty time for fire fighters includes sleep and meal periods. See official report of the proceedings, June 3 and 4, p. 209.

figure is close to the Department of Labor's estimate before Congress of 27 million (29 C.F.R. 533; II App., p. 596). The remainder of Appellants' cost estimate is based on the assumption that local governments will not qualify under § 7(k). There is no valid basis for that assumption. There are no difficulties in qualifying and if the States and cities can organize themselves to bring their views before the Courts they can be counted upon to organize themselves to take the steps necessary to conform to § 7(k).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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THE STATE OF CALIFORNIA, *Appellant*

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On Appeals from the United States District Court for the District of Columbia

---

Brief Amici Curiae for the States of Alabama, Colorado, and Michigan, in Support of John T. Dunlop, Secretary of Labor

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Brief Amici Curiae for the States of Alabama, Colorado, and Michigan, in Support of John T. Dunlop, Secretary of Labor

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This brief *amici curiae* in support of the position of John T. Dunlop, Secretary of Labor of the United States, is filed pursuant to Rule 42(4) of the Rules of this Court.

INTEREST OF THE STATES OF ALABAMA, ET AL.

At first blush, the interest of the States would appear to be with those who attack the 1974 amend-

ments to the Fair Labor Standards Act insofar as those amendments set a minimum wage and maximum hours for non-supervisory non-policy-making state and local government employees. We can therefore understand and sympathize with the decision of our colleagues from other States who are urging this Court to strike down this law. However, on more sustained reflection, we have concluded that such a result would be a pyrrhic victory for the States. We have done so although we are no less dedicated than the appellants to preserving the legitimate constitutional rights and prerogatives of the States.

By virtue of the original FLSA the vast majority of employees in the private sector are protected by federal minimum wage and maximum hour provisions, and the 1974 amendments, in addition to expanding the coverage of state and local employees, also brought federal employees under the Act. No constitutional challenge has been, or can be, brought to this latter aspect of the law. The result is that at present the same provision protects almost all employees, private and public. If the appellants in these cases were to succeed, state employees would not be covered by the FLSA and each State would have to determine whether to voluntarily pay the minimum wage and to provide overtime benefits to its own employees. The question therefore is whether it is in the interest of all the States to encourage competition between themselves and their subdivisions on the basis of lowering the labor standards of employees already on the poverty line, with a consequent reduction in efficiency and in their ability to attract more able individuals who, in such a labor market, would work for the federal government or private employers. It is our conclusion that competition on this basis demeans the public service.

We also believe, and develop in the argument herein, that the doctrinal implications of appellants' arguments would have a long-term adverse impact on the States. But above all we regard it as our duty to protect against debasement, for small pecuniary advantage, the sacred concept of "Our Federalism"; we remind our colleagues who, citing *Younger* v. *Harris,* 401 U.S. 37, 44, seize on that phrase, that the author of the *Younger* opinion, Mr. Justice Black, was in the *majority* in *Maryland* v. *Wirtz,* 392 U.S. 183, and that Mr. Justice Harlan, the author of the latter opinion, was as sensitive as any Justice to the States' *real* constitutional preogatives.

ARGUMENT

Contrary to the appellants' perfervid insistence, this case does not involve a problem of federalism, much less a serious threat to the integrity of state and local governments. For, the provisions of the 1974 amendments to the Fair Labor Standards Act[1] under attack here are an extension, necessary to further perfect the smooth and efficient flow of interstate commerce, of a long-standing national legislative program to eliminate substandard labor conditions.

I

The "Power * * * To regulate Commerce * * * among the several States * * *" was a conscious grant to Congress by the sovereign States, freely given:

> "When victory relieved the Colonies from the pressure for solidarity that war had exerted, a

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[1] P. L. 93-259, 88 Stat. 55, amending 29 U.S.C. § 201, *et seq.*

drift toward anarchy and commercial warfare between states began. . . . each State would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view. This came to threaten at once the peace and safety of the Union. Story, The Constitution, §§ 259, 260. The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was to take into consideration the trade of the United States. Documents, Formation of the Union, 12 H. Docs. 69th Cong. 1st Sess. p. 38.

"The desire of the Forefathers to federalize regulation of foreign and interstate commerce stands in sharp contrast to their jealous preservation of the state's power over its internal affairs. No other federal power was so universally assumed to be necessary, no other state power was so readily relinquished. The states were quite content with their several and diverse controls over most matters but, as Madison has indicated, 'want of a general power over Commerce led to an exercise of this power separately, by the States, which not only proved abortive, but engendered rival, conflicting and angry regulations.' 3 Farrand, Records of the Federal Convention 547." (*Hood* v. *DuMond,* 336 U.S. 525, 533-534)

And, as Mr. Justice Jackson went on to note in *Hood,* the Commerce Clause the Constitutional Convention drafted and the States ratified establishes both the "principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy" and "its corollary that the states are not separable economic units." (*Id.* at 537-538.) It follows, as Chief Justice Marshall understood (see *Gibbons* v. *Ogden,* 9 Wheat. 1, 194, 195), and, as Chief

Justice Stone restated that understanding in modern terms:

> "The commerce power * * * extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce * * *. The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution * * *. It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress." (*United States* v. *Wrightwood Dairy Co.,* 315 U.S. 110, 119.)

In sum, the States that formed this Nation determined that it was in the overall interest of each to arm the national government they created with the plenary powers necessary and proper to manage the new society's economic life. They took this step because experience had demonstrated that it was in the nature of things that local economic decision-making led to destructive economic warfare between the States, as neighbors sought to safeguard or advance their interests by actions detrimental to the public good designed to maintain or gain a competitive edge. Thus, Congress would fail to keep faith with the trust it has been granted were it to fail to protect the flow of commerce by prohibiting such "unfair tactics." (*cf. United States* v. *Darby,* 312 U.S. 100, 122-123.)

II

Congress has found that the payment of substandard wages by an employer operating an enterprise in com-

merce burdens and obstructs the flow of commerce. The national legislature has therefore made it the policy of the United States to "eliminate * * * labor conditions detrimental to the maintenance of minimum standards of living necessary for health, efficiency and general well being of workers" in such enterprises. (See § 2 of the FLSA.) Since the FLSA "declare[s] its purposes in bold and sweeping terms * * * [b]readth of coverage [is] vital to its mission." (*Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 516.) Acting on that premise, Congress has now determined to guarantee employees working for enterprises in commerce a minimum wage and maximum hours, without regard to whether their employer is public or private. Viewed from the standpoint of the legitimate needs of the States, of public employees, and of interstate commerce itself, no other decision could have been made.

The dynamic that moves private employers to reduce costs by maintaining substandard labor conditions drives public employers in the same direction. No private employer can maintain his competitive position for long if his labor costs exceed those of the other employers in the field. Public bodies are in fact in equally constant competition with each other. Thus, States and other public bodies advertise to attract new industries, new residents and tourists. Lower taxes and other monetary incentives are commonly offered.[2] The real and disturbing financial

[2] See, for example, the appendix hereto which reproduces an advertisement which the State of Massachusetts, an appellant in No. 74-878, placed in the New York Times on the Sunday after the appellants' briefs were filed in this Court, New York Times, March 9, 1975, § 3, p. 3, and an advertisement placed by the State of New York in the current Fortune Magazine, March 1975, p. 189.

difficulties which state and local governments perennially face as the result of the desire for more service and the resistance to higher prices of their customers (the taxpayers), therefore require the reduction of costs to the maximum feasible extent. (See NLC Br. pp. 81, 86.) Unfortunately, but not surprisingly, the consequence has been that some jurisdictions, like some private employers, have followed the course of least resistance and paid sub-standard wages to their employees who because of surpluses in the labor market must accept that wage or join the ranks of the unemployed. Thus, the remaining public employers who wish to deal with their employees decently, like their private counterparts, are unable to do so, absent national legislation. In other words, if Congress can not place a floor under the wages of public employees, the interstate rivalry on the basis of local concessions detrimental to the public good the Commerce Clause was designed to end will continue.

H. Rep. No. 1366, 89th Cong., 2d Sess., pp. 16-17, explained the 1966 Amendments extending the FLSA, *inter alia*, to employees of public hospitals and schools (sustained in *Maryland* v. *Wirtz*, 392 U. S. 183) by stating:

> "A custodial worker in an educational institution is as much in need of a minimum standard of living as a custodial worker in an aircraft plant. A food service employee faces the same cost-of-living problems whether employed by a hospital or a food service contractor. Neither employee should be compelled to subsidize the costs of these services to the consumer. Such institutions are compelled to purchase goods and contract services from employers who must pay the minimum wage. They cannot, in good conscience, deny their own employees this bare minimum."

This is true of each and every public employee. It matters not whether the substandard wages which the employee receives for his labor are paid by a private employer or by a public employer, be it the federal government, a State, or one of its subdivisions. Nor does it matter to the employee whether the requirement to work an excessive number of hours is imposed by a private or public employer. In either case, the employee's need for food, shelter and clothing is the same, the national unit of currency in which he pays for his purchases is the same, and the national market in which he must make those purchases is the same; and in either case the hours he can call his own of which he is deprived are the same.

Finally, the burdens imposed on the flow of interstate commerce by a failure to bring public enterprises in commerce under the FLSA are clear and plain. In 1974 Congress concluded that:

> "[By] the establishment of a minimum wage rate * * * [for] workers who do not currently enjoy such protection, and eliminating overtime exemptions where they have been shown to be unnecessary, the economy will be stimulated through the injection of additional consumer spending and the creation of a substantial number of additional jobs." (S. Rep. No. 93-690, 93d Cong., 2d Sess., p. 9.)

Moreover, as Senator Javits, the ranking Republican member of the Senate Labor Committee emphasized, Congress, in addition to stimulating the economy, also desired to promote industrial peace:

> "[W]e are very resentful, very unhappy, when workers in the public domain threaten to strike. This is inevitably the result of the deep feeling that economic justice cannot otherwise be obtained, and I respectfully submit that we will go a lot further in getting tranquility in the labor field by giving them a minimum wage status and an overtime status than in almost any other way I can think of, and prevent the feeling on their part that the only way one can get justice is by rule of the jungle, to wit, by strikes and ceasing essential public service." (120 Cong. Rec. S.2518, February 28, 1974, (daily ed.).)

The facts necessary to judge the impact of state and local governments on interstate commerce are these:

In 1971 state and local goverment purchases of goods and services, much of which had moved in interstate commerce, totaled $135 billion, approximately 13 per cent of the gross national product.[3]

In 1973 state and local governments employed 11.4 million workers, 14.8 per cent of the workforce.[4]

In 1973, approximately 400,000 public employees were paid less than $1.90; the approximate wage rate necessary to generate a poverty level income for an urban family of four was $2.27. Moreover, 10 per cent of all public employees worked more than 40 hours a week.[5]

In 1973 there were 375 work stoppages at the state and local level resulting in a loss of 1,257,200 man

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[3] 119 Cong. Rec. S14057, July 19, 1973 (daily ed.).

[4] U. S. Depart. of Commerce, Bureau of Census, Public Employment in 1973, p. 9.

[5] Background Material on the Fair Labor Standards Act Amendments of 1973, 93d Cong., 1st Sess., p. 220; H. Rep. No. 93-913, 93d Cong., 2d Sess., p. 28.

days. This is a three-fold increase since 1966 in the number of stoppages and in days lost.[6]

In the face of these expressions of Congress' intent and this data we do not comprehend how it can even be argued that there is not "a rational basis for finding [the] legislative scheme [embodied in the 1974 FLSA amendments] necessary to the protection of commerce." And, as this Court has squarely held in *Katzenbach* v. *McClung,* 379 U.S. 294, 303-304, and other cases too numerous to cite, an exercise of the commerce power that satifies that test satisfies the Constitution.

III

We not only understand, we share, the financial dilemmas which have prompted the appellants to challenge the 1974 amendments. Nevertheless, we are convinced, with all respect to them, that the interests of the States require bearing the costs of compliance since these are the inherent minimal price payable for the "material success that has come to inhabitants of the states which make up [the] federal free trade unit [established by the Commerce Clause, which success] has been the most impressive in the history of commerce" (*Hood* v. *DuMond,* 336 U.S. at 538).

Like the 1966 Act, the 1974 Act establishes "only a minimum wage and a maximum limit of hours unless overtime wages are paid, and does not otherwise affect the way in which * * * [state] duties are performed" (*Maryland* v. *Wirtz,* 392 U.S. at 193). Thus, "Congress has 'interfered with' * * * state functions only to the extent of providing that when a state employes people * * * it is subject to the same restric-

[6] U. S. Dept. of Labor, Bureau of Labor Statistics, Work Stoppages In Government, Report 434, Table 1.

tions as a wide range of other employers whose activities affect commerce * * *." (*Id.*) And, in the 1974 amendments Congress applied these same restrictions to the federal government as an employer. As the Senate Report stated:

> "The Committee intends that government apply to itself the same standards it applies to private employers. This principle was manifested in 1972 when the Senate overwhelmingly voted to apply Federal equal employment opportunity standards to public sector employers. Equity demands that a worker should not be asked to work for subminimum wages in order to subsidize his employer, whether that employer is engaged in private business or in government business."[7]

Surely, there is nothing in "Our Federalism" (*Younger* v. *Harris,* 401 U.S. 37, 44) that requires that the States be granted a preferred position over the United States. Indeed, in our view, the fact that the States are treated in like fashion as the national government itself is sufficient to demonstrate that this exercise of the commerce power is not one that could bring about "the utter destruction of [a] State as a sovereign political entity" (cf. *Maryland* v. *Wirtz,* 392 U.S. at 196). Moreover, the claim of a constitutional entitlement to preference over private employers raises grave questions of principle. We believe that we are not distorting the sense of Mr. Justice Brandeis' observations in his dissent in *Olmstead* v. *United States,* 279 U.S. 438, 485, when we invoke them in the present context:

> "Decency, security, and liberty alike demand that government officials shall be subjected to the same

[7] S. Rep. 93-690, 93d Cong., 2d Sess., p. 24.

rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example."

Certainly the appellants have failed to suggest a principled constitutional theory that would require that state and local governments be permitted to pay a below-poverty level wage when Congress has determined that its own employees and those of private employers whose effect on interstate commerce is indistinguishable are to be paid an amount that allows them to earn at least the basic necessities of life.

IV

The practical considerations demonstrating that the 1974 amendments are necessary to protect commerce have not only prompted us to file this brief *amici curiae* in support of the Secretary of Labor, but are decisive on the constitutional issue raised by appellants. For "interstate commerce itself is a practical conception." (*Labor Board* v. *Jones & Laughlin,* 301 U.S. 1, 41-42.) Congress is constitutionally empowered to, and did, as the reports of its committees demonstrate,[8] adopt the 1974 amendments expanding the FLSA's coverage in response to these economic realities. And, after *Jones & Laughlin* there can be no doubt that Congress was not required to restrict the exercise of its legislative power to regulate interstate commerce to the narrow scope last given credence in *Carter* v. *Carter Coal Co.,* 298 U.S. 438, on which our brother from California is compelled to rely (Cal.

[8] S. Rep. No. 93-690, 93d Cong., 2d Sess., H. Rep. 93-913, 93d Cong., 2d Sess.

Br. 30-32). Quite aside from the legal defects of appellants' restrictive view of the Commerce Clause we are forced to take issue with their reasoning as to the relationship between the federal and state governments because it is fraught with danger to the States, as we now demonstrate.

Taking their cue from the dissenting opinion in *Maryland* v. *Wirtz,* 392 U.S. at 201-205, the appellants rely heavily on the language in the several opinions in *New York* v. *United States,* 326 U.S. 572, which stated that there remain some limitations on the power of the federal government to impose taxes on the states. (See NLC Br. pp. 64-68; Cal. Br. pp. 25-26.) It is contended that because the congressional taxing power is of equal dignity with the commerce power, the limitations on the former should also be applied to the latter. The short answer to the same argument is that it was squarely met and unanimously rejected in *United States* v. *California,* 297 U.S. 175, 184-185).[9]

[9] "The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power, see Metcalf & Eddy v. Mitchell, 269 U.S. 514, 522-524, which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it. Helvering v. Powers, 293 U.S. 214, 225, Ohio v. Helvering, 292 U.S. 360, South Carolina v. United States, 199 U.S. 437, see Murray v. Wilson Distilling Co., 213 U.S. 151, 173, explaining South Carolina v. United States, supra. Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual."

This precedent, followed in *Maryland* v. *Wirtz,* 392 U.S. at 198, is dispositive of appellants' reliance on the tax analogy. But even acceptance of that analogy would not inevitably, or even properly, lead to the invalidation of the 1974 amendments. For, if the tax immunity doctrine were to be borrowed here, the precise analogy would be the cases involving the power of one government to tax the income of the employees of another government. Since *Helvering* v. *Gerhardt,* 304 U.S. 405, 420-421, it has the law that the federal government does have such power:

> "Even though, to some unascertainable extent, the tax deprives the states of the advantage of paying less than the standard rate for the services which they engage, it does not curtail any of those functions which have been thought hitherto to be essential to their continued existence as states. At most it may be said to increase somewhat the cost of the state governments because in an interdependent economic society, the taxation of income tends to raise (to some extent which economists are not able to measure, see Indian Motocycle Co. v. United States, supra (283 U.S. p. 581, footnote 1)) the price of labor and materials. The effect of the immunity if allowed would be to relieve respondents of their duty of financial support to the national government, in order to secure to the state a theoretical advantage so speculative in its character and measurement as to be unsubstantial. A tax immunity devised for protection of the state as governmental entities cannot be pressed so far."

The *Gerhardt* case was followed in the converse situation in *Graves* v. *People of New York ex rel. O'Keefe,* 306 U.S. 466, which held that the state governments are empowered to tax the income of the employees of the

federal government and of federal corporations, and which overruled *Collector* v. *Day,* 11 Wall. 113. The Court thus discredited the doctrinaire theorizing of the latter case whereunder any tax by either sovereign on the functions or employees of the other was regarded as unconstitutional, and instead focused on the realities of the situation.

It was in this more modern spirit that Mr. Justice Harlan wrote for the Court in *Maryland* v. *Wirtz,* when he said: "Since the argument is made in terms of interference with 'sovereign state functions,' it is important to note exactly what the Act does." (392 U.S. at 193.) He pointed specifically to the exemption in the 1966 Act of "employees employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) * * *.'"[10] When the 1974 amendments are examined, Congress' care is similarly demonstrated because they exclude:

> "(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—
>
> "(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and
>
> "(ii) who—
>
> "(I) holds a public elective office of that State, political subdivision, or agency,
>
> "(II) is selected by the holder of such an office to be a member of his personal staff,

[10] *Id.*, quoting § 13(a)(1) of the Act as it then stood, 29 U.S.C. § 213(a)(1) (1964 ed., Supp. 2).

"(III) is appointed by such an officeholder to serve on a policymaking level, or

"(IV) who is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office. [11]

Particularly because of these exclusions, we are confident that the 1974 amendments will not adversely affect any essential function of the States and that their only adverse impact will be "to increase somewhat the costs of the state governments." (*Helvering* v. *Gerhardt*, 304 U.S. at 420-421.)

That fiscal disadvantage is far less than the inevitable cost to the States if appellants' view of the interrelationship of the federal and state governments were to prevail. For the federal government could be excluded from regulating the wages and hours of the employees covered by the 1974 amendments only by returning to the absolutist notions of *Collector* v. *Day, supra,* as California, which relies on that case (Cal. Br. p. 25), well appreciates. And in that event the States would lose the power (acknowledged in *O'Keefe, supra*) to tax the incomes of the constantly growing number of federal employees. This is a price that we are unwilling to pay to retain the dubious right to maintain for our own employees standards below those to which the federal government and private employers must adhere. [12]

---

[11] Section 6(a)(2) of the 1974 Act amending § 3(e)(2)(C) of the original Act.

[12] We also cannot overlook the strong tendency of absolutes to be carried to the limts of their illogic. And so, a return to the philosophy of *Collector* v. *Day* would also jeopardize cases such as *United States* v. *City of Detroit,* 355 U.S. 466, and its companion cases, which have been far more liberal than the prior law in allowing the States to impose property taxes on private parties even though there is a resulting economic impact on the federal government. As the federal government becomes a more and more important purchaser of the goods and services of private business, a return to the older precedents would create fiscal difficulties for the States now, and even more serious difficulties over time.

CONCLUSION

For the above stated reasons, as well as those set forth by the Secretary of Labor, the judgment of the United States District Court for the District of Columbia should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-878 and 74-879

NATIONAL LEAGUE OF CITIES, ET AL., *Appellants*

v.

JOHN T. DUNLOP, Secretary of Labor, *Appellee*

STATE OF CALIFORNIA, *Appellant*

v.

JOHN T. DUNLOP, Secretary of Labor, *Appellee.*

On Appeals from the United States District Court for the District of Columbia

---

BRIEF AMICUS CURIAE FOR THE COALITION OF AMERICAN PUBLIC EMPLOYEES

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On Appeals from the United States District Court for the District of Columbia

---

BRIEF AMICUS CURIAE FOR THE COALITION OF AMERICAN PUBLIC EMPLOYEES

This brief *amicus curiae* is filed by the Coalition of American Public Employees (Coalition) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE COALITION OF AMERICAN PUBLIC EMPLOYEES

The Coalition of American Public Employees (Coalition) is an association of organizations, each of which represents employees both for purposes of collective bargaining and for other purposes of mutual aid and protection. These employees are predominantly employees of state and local governmental bodies.

American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO has approximately 700,000 members who are employees of state and local government bodies and represents many more such employees. National Education Association (NEA) is the largest teacher organization in the United States, with a membership of approximately 1.6 million professional educators, most of whom are teachers or administrators in public educational institutions. National Treasury Employees Union (NTEU) represents approximately 65,000 non-supervisory employees of the United States Department of the Treasury. American Nurses Association (ANA) has approximately 200,000 members, many of whom are employees in state and local governmental institutions. Physicians National House Staff Association (PNHA) has a membership of approximately 10,000 physician house officers, predominantly interns and residents, many of whom are employees of state and local institutions.

In toto, the Coalition represents approximately 3 million public employee members and in addition approximately 2 million more public employees who are represented by the constituent organizations of the

Coalition through negotiated collective bargaining agreements on their behalf.

The Coalition and its constituent organizations are the freely selected representatives of millions of public employees directly affected by the 1974 amendments to the Fair Labor Standards Act whose validity is at issue here. As such, these organizations have had, and have now, a continuing interest in support of these amendments and in urging the Court to reject this attack upon their enforcement. In addition, the Coalition and its constituent organizations share the Congressional concern embodied in those amendments to minimize labor disputes and to prevent economic exploitation of marginal workers.

ARGUMENT

MARYLAND v. WIRTZ, 392 U.S. 183, WAS CORRECTLY DECIDED AND SHOULD BE FOLLOWED

Introduction

The single issue which this brief *amicus curiae* will address is whether *Maryland* v. *Wirtz,* 392 U.S. 183 (hereafter sometimes referred to as "*Maryland*"), shall remain the law. That issue is raised for the first time in this litigation at pp. 120-128 of the brief on the merits of the National League of Cities (hereafter the "League"), and appellant California still appears to believe that reversal can be achieved without overruling *Maryland.*[1] But, as we shall briefly show, it is the *only* genuine issue on this appeal.

---

[1] The brief for appellants in No. 74-878, National League of Cities *et al.,* will be cited herein as "NLC Br."; the brief for appellant in No. 74-879, the State of California, will be cited as "Cal. Br.".

Every argument raised by the appellants for invalidating the 1974 amendments[2] to the Fair Labor Standards Act ("FLSA") insofar as they affect public employees was either decided against appellants' position when *Maryland* sustained the 1966 amendments, or was stated to be premature in a suit for declaratory and injunctive relief. Most obviously and decisively, *Maryland* v. *Wirtz* rejected the appellants' basic contention that the establishment of a minimum wage for state and local government employees is beyond the legislative powers of Congress. But the opinion there also anticipated the major details of the present appellants' arguments.

Thus, the present appellants' rhetorical excesses[3] were foreshadowed by generous portions of hyperbole in the appellants' brief in *Maryland,* which drew from this Court the following cool response:

> "Since the argument is made in terms of interference with 'sovereign state functions,' it is important to note exactly what the Act does. Although it applies to 'employees,' the Act specifically exempts any 'employee employed in a bona

[2] Public Law 93-259, 88 Stat. 55, amending Fair Labor Standards Act of 1938, 52 Stat. 1060 etc., 29 U.S.C. §§ 201 *et seq.*

[3] The summit is perhaps reached at NLC Br. 58: "This Act's 1974 Amendents are repugnant to the entirety of the Constitution of the United States." See also, e.g., NLC Br. 51: "startling new takeover of a State and local Government essential governmental function"; NLC Br. 55: "Congress move[d] in to regulate and clamp controls on the entirety of State and local Governments as Governments"; Cal. Br. 21: "Congress has intruded into the very halls of the legislatures of the sovereign States"; Cal. Br. 23: "this case * * * entails a patent federal attempt to regulate all sovereign activity"; Cal. Br. 24: "The unprecedented Federal intrusion at hand goes to the entire operation of the State governments".

> fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) . . . .' * * *
>
> The Act establishes only a minimum wage and a maximum limit of hours unless overtime wages are paid, and does not otherwise affect the way in which * * * duties are performed. Thus appellants' characterization of the question in this case as whether Congress may, under the guise of the commerce power, tell the States how to perform medical and educational functions is not factually accurate." 392 U.S. at 193, footnotes omitted.

As the 1974 amendments similarly exclude non-civil service employees who are elected or appointed to policymaking positions or to the personal staffs of elected officials,[4] the present appellants' polemics are also "not factually accurate."

The particular aspect of the amendents which appellants most vigorously attack are the overtime limitations for fire fighters and employees engaged in law enforcement. Here also, the *Maryland* opinion presents a precise parallel, for in that case the States emphasized the practical difficulties which would be raised by applying the FLSA's overtime provisions to State school and hospital personnel; this Court carefully considered and decisively rejected the argument, 392 U.S. at 194, n. 22. So too, appellants' objection that the legislative findings were inadequate is not only unfounded, but is "quite irrelevant", for "[w]e are not concerned with the manner in which Congress reached its factual conclusions" (392 U.S. at 190, n. 13).

[4] See § 6(a)(2)(C) of the 1974 Act, reprinted at NLC Br. 4a.

Likewise significant is what *Maryland* v. *Wirtz* held would *not* be decided in a suit for declaratory judgment and injunctive relief against the operation of a statute. With characteristic scruple to resolve only those constitutional issues necessarily presented, Justice Harlan pretermitted consideration of the question whether the Eleventh Amendment forbids suits against the States under §16 (b) for liquidated damages for violations of the Act. 392 U.S. at 199-200. Yet, the appellants in both cases argue the Eleventh Amendment issue here without even adverting to its disposition in *Maryland* v. *Wirtz* (NLC Br. 128-131; Cal. Br. 53-58). In *Maryland* the Court also held that "the District Court was correct in declining to decide, in the abstract and in general, whether schools and hospitals have employees engaged in commerce or production" (392 U.S. at 201). So too, it would be premature to determine in the abstract whether particular employees of the states or their subdivisions who work elsewhere than in Schools and hospitals are constitutionally covered.

We note finally that appellants are challenging the application of the 1974 amendments to all state and local government employees, without even excluding school and hospital employees, whose coverage was sustained in *Maryland* v. *Wirtz*. Those employees are affected by the 1974 amendments because the amount of their minimum wage was raised and because they were brought under the Age Discrimination in Employment Act of 1967.[5] See §§ 3 and 28(a)(2) of the 1974 amendments (NLC Br. 1a, 19a). Appellants do not even attempt to argue that the constitutionality of minimum wage laws depends on the amount of the min-

[5] 81 Stat. 602, 29 U.S.C. § 621 *et seq.*

imum wage which Congress establishes, or that if Congress can establish minimum wages and maximum hours for state and local employees, it cannot protect those same employees against discrimination on the basis of age.

In sum, appellants cannot obtain the relief which they seek in this action unless *Maryland* v. *Wirtz* is overruled.

Maryland v. Wirtz Was Firmly Grounded in Precedent and Principle.

The League asserts that "[t]he Court did not consider the impact of the 1966 amendments on the entire constitutional scheme of Federalism" (NLC Br. 123; see also *id.* 26).[6] This criticism of the opinion, written for the Court by Mr. Justice Harlan, who was not insensitive to the legitimate interests of the States, is wholly unwarranted.[7] He reasonably concluded that if scrupulous attention were given to "exactly what the Act does" (392 U.S. at 193), the conclusion that the 1966 amendments were within the constitutional power of Congress followed as a matter of course because there was a rational basis for the 1966 amendments (id. at 193-195) and because the argument that the commerce power "must yield to state sovereignty in the performance of governmental functions * * * sim-

[6] At NLC Br. 26 the same criticism is made also of the briefs in the *Maryland* case. This seems less than fair to Professor Charles Alan Wright's able Brief for Appellant (State of Texas), or to the elaborate presentation in the Brief of Appellants (Maryland et al.) in that case, in which 13 of the present appellant States joined and which was signed by 3 of the same attorneys general who are signatories to the League brief.

[7] To be sure, his opinion fell very far short of discussing each of the "114 references to States in the Constitution" (NLC Br. 6, n. 6; see also *id.* 46).

ply is not tenable" (*id.* at 195) in light of this Court's precedents, which were then analyzed.

In discussing these precedents, the League begins with the astounding claim "that no case cited by the Court [at 392 U.S. at 193-199] involved a challenge to Federal interference with State or City Government operations" (NLC Br. 123). Unless the phrase "interference with State or City Government operations" is given some new and occult meaning not explained in the League's brief, that statement is obviously wrong; it would be more accurate to state that *each* case cited involved such interference, as the States in those cases vigorously contended. The next statement at NLC Br. 123 is likewise unfounded; for example *Sanitary District* v. *United States,* 266 U.S. 405 dealt neither with a situation "where the interest of the Federal Government was held superior to the interest of the States in regulating private industry" (NLC Br. 123) nor with a situation "where a State was held to be directly engaged in commercial competition with a particular private industry (*id.*). And even as the League's generalizations regarding the precedents cited in *Maryland* are wholly without merit, so its attempt to distinguish the three specific precedents which it discusses (NLC Br. 124-125), serves only to confirm that they were directly in point and controlling.

The first of these cases was *Sanitary District* v. *United States,* 266 U.S. 405, where Mr. Justice Holmes wrote for a unanimous Court. *Sanitary District* was an action by the United States under the Rivers and Harbors Act of 1899, 30 Stat. 1121, to limit the withdrawal of water from Lake Michigan by the Sanitary District of Chicago. The League says that *Sanitary District* "cannot be read without reference to the

treaty power and the conduct of foreign relations by the Federal Government" (NLC Br. 124). But the Court itself made clear that the case *should* be so read when it stated that the "main ground [for the Act of Congress] is the authority of the United States to remove obstructions to interstate and foreign commerce. There is no question that this power is superior to that of the states to provide for the welfare or necessities of their inhabitants" (266 U.S. at 426). The latter sentence, specifically relied on in *Maryland* (392 U.S. at 196) is sought to be deprecated as "dictum" (NLC Br. 124). The words of Mr. Justice Holmes merit respectful attention even if they were "dictum" or written *ex cathedra.*[8] But the pronouncement of dicta was not Mr. Justice Holmes' style, and in his opinion in *Sanitary District* he did not depart from his custom of dealing only with essentials. For, the Sanitary District defended on the ground, among others, that the continued withdrawal of more water than the United States would allow was vital "to the health of the inhabitants of Chicago, both for the removal of their sewage and avoiding the infection of their source of drinking water in Lake Michigan, which had been a serious evil before" (266 U.S. at 425). Justice Holmes refused to balance the Chicago residents' need for water against that of the federal government to eliminate an obstruction to navigable waters, precisely because he deemed such a balancing process to be constitutionally impermissible,

---

[8] Directly apposite here is Justice Holmes' observation that "one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end." Holmes, Speeches, Law and the Court, 98, 102.

once it was established that Congres had exercised its legislative power under the Commerce Clause. Thus, the *Maryland* opinion correctly observed that *Sanitary District* establishes "that the Federal Government, when acting within a delegated power, may override coutervailing state interests whether these be described as 'governmental' or 'proprietary' in character" (392 U.S. at 195) [9].

Equally wide of the mark are the League's attempts to distinguish *United States* v. *California,* 297 U.S. 175, for both the points made at NLC Br. 125-126 relate only to the determination in *Maryland* v. *Wirtz* that state schools and hospitals are engaged in commerce, a proposition for which that opinion did not rely on *California.* [10] That unanimous decision *does,* as was

[9] As an alternative ground for evading the force of the *Sanitary District* precedent the League argues that the rational basis for legislation" in that case "is much more apparent than the connection in the amendments upheld in *Wirtz* between State Government and commerce" (NLC Br. 125). But of course, the question whether there is a rational basis for legislation differs from the question whether a regulation of commerce can validly be applied to state or city government operations, the issue to which this portion of the League's brief is purportedly addressed, see *id.* at 123. These points were dealt with separately in the opinion in *Maryland,* and *Sanitary District* was not cited to establish that the 1966 amendments to the FLSA had a rational basis.

[10] While this Court in *Maryland* v. *Wirtz* "did not find that State-owned schools and hospitals *produced* either goods or services with destinations in other States," (NLC Br. 125, emphasis supplied), it *did* find that they *purchased* goods from other States, see 392 U.S. at 194-195. And, of course, schools and hospitals are not the only state agencies that make such purchases. Similarly, the argument "that States and Cities here are not in *serious* competition with other States and Cities or with private businesses" (NLC Br. 126, emphasis supplied), has nothing to do with the holding which *Maryland* v. *Wirtz* derived from *United States* v. *California.* Indeed, in *Maryland* the existence of competition be-

said in *Maryland,* establish the principle that "[i]f a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation" (392 U.S. at 197), as was well understood even before *Maryland.* See, *California* v. *United States,* 320 U.S. 577, 586; *Case* v. *Bowles,* 327 U.S. 92, 101, 102, n. 8; *California* v. *Taylor,* 353 U.S. 553, 568.

The League seeks to distinguish *Case* v. *Bowles,* 327 U.S. 92, on the ground that it arose under a statute

tween public and private schools and hospitals was only one of two separate grounds justifying the FLSA's "enterprise" definition of coverage, see 392 U.S. at 192-193. However, appellants argue so strenuously that they are not engaged in competition with private enterprise or with other state and local governments, that a few comments on that point (which other briefs will doubtless elaborate) seem appropriate:

The circumstance that governments subcontract many activities to private employers establishes the existence of genuine economic competition between them and the potential subcontractors. It is rather surprising that it should be argued that the Constitution *requires* that states and cities be given an advantage in competing with private enterprise. Further, the particular skills of non-policy making employees, whose wages and hours alone are regulated under the statute, are readily transferable between private and public employers. Secretaries utilize the same alphabet and the same shorthand symbols whether they are working for a private bill collecting agency or a tax collecting agency (cf. NLC Br. 51) or other governmental activity, and the engineering and janitorial services in a government building do not differ one iota from those performed in a private office building. Additionally, it is utterly unrealistic to deny that States and municipalities are constantly in competition with each other, for example, to attract new enterprises, see, *e.g.,* the appendices to the Brief *Amicus Curiae* of the States of Alabama *et al.,* filed in the present cases. Would the Governor of Florida (NLC Br. 12) accept the avowal (Cal. Br. 47) of "California's noncompetitive nature"?

enacted pursuant to the war power rather than the commerce power (NLC Br. 124, n. 98). But the principle there established, that there is no "doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other" (327 U.S. at 101) and followed in *Maryland,* 392 U.S. at 195, was not and cannot be thus limited. Rather, the decision was based on a broad holding concerning the effect that the Supremacy Clause *does have* on state powers (*id.* at 102-103), and that the Tenth Amendment *does not have* on powers delegated to the national government (*id.* at 102, text and note at n. 8, citing, *inter alia,* four Commerce Clause cases, including *United States* v. *Darby,* 312 U.S. 100 and *United States* v. *California,* 297 U.S. 175).[11]

The upshot is that *Maryland* v. *Wirtz* was not, despite the claim of appellants there, "a case of first impression";[12] *a fortiori,* contrary to NLC Br. 51, this case is not either. Rather, in order for appellants to prevail in this case, it is necessary not only that *Maryland* v. *Wirtz* be overruled, but also that this Court disapprove the unanimous decisions in *Sanitary District* v. *United States, supra,* and *United States* v. *California, supra,* and the 7 to 1 decision in *Case* v. *Bowles, supra.*

[11] Additionally, even as the creation of a national war power was "a primary purpose of the federal government's establishment" (*id.* at 102), so was the establishment of a commerce power. It is familiar history that the State of Virginia initiated the movement which ultimately produced the Constitution in order to federalize the regulation of foreign and interstate commerce. See, *e.g., Hood* v. *DuMond,* 336 U.S. 525, 533-534.

[12] Brief of Appellants (Maryland *et al.*), No. 742, Oct. Term 1967, p. 12.

Additionally, it would be necessary that this Court disapprove the unanimous decision in *California* v. *Taylor* 353 U.S. 553, where this Court squarely held that Congress may, in the exercise of its commerce power, regulate the relationship between a state government and its employees. California there argued:

> "A fundamental attribute of state sovereignty is the right of a state to establish the terms upon which its employees will carry out state functions."[13]

It asserted further:

> "The incidental importance of collective bargaining by state employees engaged in interstate railroad commerce, cannot justify federal interference with the sovereign right of a state to control its employee relationship."[14]

In this connection California argued that the case "presents to the Court the task of balancing and accommodating constitutional powers—the power of Congress to regulate labor relations in interstate commerce * * * and the power of the sovereign states to control through state laws their relationship with their employees".[15] These constitutional arguments were dismissed by Mr. Justice Burton in a single paragraph (353 U.S. at 568) on the authority of *United States* v. *California, supra,* and *California* v. *United States,* 320 U.S. 577.

[13] Brief for Petitioner State of California, No. 385, Oct. Term 1956, p. 51 (heading).

[14] *Id.*, p. 55 (heading).

[15] *Id.*, p. 56.

California v. *Taylor* is nowhere mentioned in the League's 132-page brief. California, on the other hand, attempts to distinguish each of its three previous losses on this issue, as well as *Sanitary District, supra,* and *Board of Trustees* v. *United States,* 289 U.S. 48, by citing these cases for the following proposition: "State activities have never been totally immune from regulation where such activities were 'proprietary', i.e. activities which were or could be performed by private enterprise." (Cal. Br. 46, n. 22.) This sentence is remarkable for three reasons. First, *United States* v. *California* expressly rejected the governmental-proprietary distinction in this precise context, 297 U.S. at 183-184, quoted in *Maryland,* 392 U.S. at 197-198;[16] second, the history of California's reliance on that distinction confirms its utter uselessness for reasoned *constitutional* analysis;[17] and third, the argument is tantamount to a concession that California is not entitled to the sweeping relief sought in the complaint, since, of the activities engaged in by employees whose wages and hours are actually regulated under the 1974 amendments most, if not all, "could be performed by private enterprise".[18]

[16] While California relies on *Employees* v. *Missouri Public Health Dept.,* 411 U.S. 279, 284, as having revived the governmental-proprietary distinction, it ignores that passage of the opinion (quoted at p. 18 *infra*) which is pertinent in *this* case.

[17] In *United States* v. *California* the State argued that its railroad was engaged in a governmental ("sovereign") function. In *California* v. *United States,* it sought to escape that precedent by contending that while "the operation of a railroad" was "an activity usually carried on by private enterprise", the commerce power did not extend to what was "at the time of the adoption of the Federal Constitution * * * generally recognized as a usual, traditional and essential governmental function", such as "the construction, maintenance and administration of ports by States" (Brief for Appellant State of California, No. 20, Oct. Term 1943, p. 45). The State now acknowledges that the wages and working conditions of its railroad and seaport employees may be regulated under the commerce power because these activties are "proprietary", but argues that Congress may not regulate the wages and hours of "airport environmentalists" because they are engaged in a "governmental" function (Cal. Br. 47, text and note at n. 24, line 5).

The short of the matter is that appellants have been unable to advance any principled rule for "carv[ing] up the commerce power" (392 U.S. at 198), which would preserve any portion of that power with regard to state activities, but would deny Congress the authority to regulate the wages and hours of state employees. The attempt to find a constitutional basis for denying Congress the power to regulate state activities which affect interstate commerce is as intellectually fascinating as trying to square the circle—and, as shown by 50 years of litigation, is inevitably just as futile. Only rarely have the States approached the task by candidly invoking discredited constitutional authority, as does California here by quoting *Carter* v. *Carter Coal Co.,* 298 U.S. 238 (Cal. Br. 30-32). The more common techniques have been verbal gymnastics,[19] tacit invitations to escape logic altogether by shrill emotive appeals,[20] and resort to wholly inapposite authority.

The latter technique is exemplified by the League's reliance on a justly celebrated passage from Justice

[18] This of course includes fire fighting, the regulation of which most troubles California (Cal. Br. 11-20). See the leading FLSA case of *Skidmore* v. *Swift & Co.,* 323 U.S. 134, and is companion, *Armour & Co.* v. *Wantock,* 323 U.S. 126.

[19] See, *e.g.,* the references at p. 14, n. 17, *supra,* and also the passages collected at ns. 8, 9, and 10 of the Brief of the Appellees (Wirtz *et al.*) in *Maryland,* No. 742, Oct. Term 1967.

[20] See, *e.g.,* the passages quoted at p. 4, n. 3, *supra.*

Brandeis' dissenting opinion in *New State Ice Co.* v. *Liebmann,* 285 U.S. 262, 311 (NLC Br. 90, 112). But Mr. Justice Brandeis did not regard the States as "laborator[ies]" in which to vivisect the Congressional commerce power. The issue in *Liebmann* was not Federalism; it was whether the courts should strike down legislation in the name of substantive due process. Thus, Mr. Justice Brandeis also said:

> "There must be power in the State *and the Nation* to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the 14th Amendment, or the States which ratified it, intended to deprive us of the power to correct the evils of technonogical unemployment and excess productive capacity which have attended progress in the useful arts. 285 U.S. at 311, emphasis added.

Plainly, Mr. Justice Brandeis would not have denied Congress the power to experiment in its fight against substandard wages and unemployment (a major objective of the overtime provisions of the FLSA) by first excluding state employees from the FLSA, then including some, and later adding others. (*Cf. Maryland,* 392 U.S. at 199, n. 28.)

We submit finally, that the reasoning of the dissenting opinion in *Maryland* v. *Wirtz* was not correct, and should not now be adopted by the Court. In urging that the 1966 amendments be struck down, the dissenting Justices invoked the analogy of the tax immunity cases such as *New York* v. *United States,* 326 U.S. 572. With all respect, we contend both that this analogy is inapposite, and that it could not, even if sound, protect the states from the particular regulation of commerce which was involved in *Maryland* and is involved herein.

As to the first point, the analogy was squarely and explicitly rejected in *United States* v. *California,* 297 U.S. 175, 185.[21] This holding in turn was clearly foreshadowed by the unanimous decision in *Board of Trustees* v. *United States,* 289 U.S. 48, 56, also cited in *Maryland* v. *Wirtz,* 392 U.S. at 198. With respect to the second point, we note that in the factual circumstance closest to the issue involved in this case, the regulation of wages and hours of government employees, the states enjoy no immunity. For, in *Helvering* v. *Gerhardt,* 304 U.S. 405, it was held that the federal government does have power to tax the income of state employees and state officials. And while the dissent in *Maryland* perceived that the 1966 regulation "overwhelm[ed] state fiscal policy" (392 U.S. at 203), we think the States, which receive substantial federal funds, seriously exaggerated the fiscal consequences of the 1966 amendments, and appellants herein have repeated that performance. In any event, we believe that the sounder view is that taken in the opinion of the Court in

---

[21] It is characteristic of the League's use of precedent that it cites the *California* case for the proposition "that State immunity from Federal taxation is 'implied from the nature of our federal system'" (NLC Br. 67), but omits to mention that the Court promptly thereafter held that "there is no such limitation upon the plenary power to regulate commerce" (297 U.S. at 185). So too, in invoking the Tenth Amendment the League cites *Hopkins Savings Association* v. *Cleary,* 296 U.S. 315, 337. But in the sentence immediately following that quoted at NLC Br. 108, Mr. Justice Cardozo was careful to point out:

> "We are not concerned at this time with the applicable rule in situations where the central government is at liberty (as it is under the commerce clause when such a purpose is disclosed) to exercise a power that is exclusive as well as paramount." (*Id.* at 338).

Employees v. *Missouri Public Health Dept.*, 411 U.S. 279, 284:

> "Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States." *Id.*

CONCLUSION

We have discussed *Maryland* v. *Wirtz* and its antecedents at considerable length, not because we believe that Mr. Justice Harlan's opinion requires exegesis, but out of respect for this Court's apparent decision, in denying the Motion to Affirm, to reexamine the question there decided. But we are confident that on such reexamination this Court will conclude that the result in *Maryland* v. *Wirtz* was not only correct, but unescapable, given the relationship between the United States and the States as established by the Supremacy Clause, and described by Mr. Justice Holmes at the very outset of his legal analysis in *Sanitary District,* 266 U.S. at 425:

> "This is not a controversy between equals."

The judgment of the District Court should be affirmed.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-878

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Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Continued)

REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-878

NATIONAL LEAGUE OF CITIES, *et al.*,

Appellants,

v.

HON. JOHN T. DUNLOP,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF

I. SUMMARY OF ARGUMENT: THE ACT CURES NO EVIL, RIGHTS NO WRONG

This Case involves a basic fundamental shift in constitutional power. The issue arises over control of Government employees of States and local Governments.

In their briefs, Appellee and his supporting Labor Unions and Senators, insist that the impact of the Fair Labor Standards Act (hereafter "Act") and its Amendments of 1974 (hereafter "1974 Amendments") on States and Cities is so miniscule as to be insignificant.

The District Court below found great fiscal and non-fiscal impact (App. 650).[1] At the same time, the evidence as to putative evils cured and wrongs righted is stretched so thin it does not satisfy the criteria enunciated by this Court for a significant enough nexus to commerce to establish a rational basis for regulation under the Commerce Clause. Distinct and higher criteria must be met under our system of Government, constitutional Federalism, before Congress can, as is done here, impose new and unprecedented governmental burdens and controls directly on State and local Governments.

Appellee, in his brief, refuses to apply the stiffer criteria, citing *Maryland v. Wirtz*, 392 U.S. 183. (Br. 32) It is a quantum leap from the schools and hospitals and the limited facts and Government powers involved in *Wirtz* to the totality of State and local Government powers and facts involved here, a jump in logic and argument which is only possible if one stays within the parameters of *Wirtz*. But so much more is involved here, and the majority in that case took the limited perspective there presented and did not apply the criteria of constitutional Federalism in passing on the 1966 amendments. The 1974 Amendments, by their very breadth, preclude an answer confined to *Wirtz*: rather, the answer must come from constitutional Federalism itself.

---

[1] The Appellee (Br. 8n.7) argues that there were no factual findings by the District Court below. This is plainly contradicted by that Court's statement of its findings under both Rule 12 and Rule 56, Fed.R.Civ.P. (App. 652). The findings are not favorable to Appellee.

In this Brief, other briefs will be cited as follows: Brief for Appellants National League of Cities *et al.* (NLC Br.), Brief of Senators Williams and Javits (Sen. Br.), Brief of AFL-CIO (AFL Br.), Brief of CAPE (CAPE Br.), Brief of Florida Police Benevolent Ass'n (Fla. B.P.A. Br.), Brief of the States of Alabama, Colorado, Michigan and Minnesota (Ala. Br.).

Appellee's brief asks this Court to sustain this Act as constitutional but that brief cites no evil of substance that the Act will cure. Nor does Appellee's brief cite any wrong of substance that the Act will right. Appellants' "Governmental Impact Statement" and Appellee's "Non-Impact Claims" as set forth herein establish these facts.

Disruption – which produces both large costs and a mass of confusion (Pritchard Deposition at 119-123, App. 167-169)–proceeds not from the minimum wage provisions of the Act which allegedly will increase the pay of an unidentified 95,000 out of 11.4 million employees (Appellee's Br. 16n.13), but from the new overtime and administrative provisions, the new preemptions and overlapping controls, decision making and other power shifts, the many new requirements set forth in the "Governmental Impact Statement", *infra*. Not even State and City experts such as Pritchard and Byrley[2] could have foreseen this; certainly the Congress did not.[3]

The Appellee admits (Br. 36) that this Court must balance the interest of the States and Cities, protected

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[2] Appellee quotes testimony from, the *Hearings* on these Amendments (Br. 49 n.42) that the major component of cost owing to the 1974 Amendments is police and fire overtime. Yet, States and Cities did not realize the true impact of the 1974 Amendments until Pub. L. No. 93-259 was approved and had to be taken into account in the State and City budget process. (Pritchard Deposition at 20-21, App. 99)

[3] "The actual impact on State and local governments then, of a 40 hour standard, will be virtually non-existent", H.R. Rep. No. 913, 93d Cong., 2d Sess. 29.

by the entire Constitution's system of Federalism, against the Congress' claim to act under its constitutionally limited powers. Appellee, however, fails to recognize the tremendous fiscal and nonfiscal impact of the 1974 Amendments on State and City Government, an impact so disruptive of our Federal system of Government that two of Appellee's predecessors in office opposed the Act. Appellee thus continues the congressional short-sightedness of recognizing only a small portion of the impact which the Act will have.

The Act's impact is important, first, because it indicates the extent to which State and local sovereignty has been destroyed, and second, because it demonstrates the minimal nature of the "problem" which the Act was designed to remedy. By confining his statistical analysis to payroll costs merely (the costs of a higher wage for an alleged 95,000 out of 1.4 million employees, and additional overtime payments), Appellee fails to take into account major factors listed in the following "Governmental Impact Statement" which revolve around four terms: duplication, uncertainty, litigation, and damage to fiscal integrity.

Under constitutional Federalism criteria, Appellants' "Governmental Impact Statement" herein, when weighed against Appellee's "Non-Impact Claims," inexorably leads to the conclusion that the Act is unconstitutional.

II. APPELLANTS' GOVERNMENTAL IMPACT STATEMENT

1. New Federal records are required for all State and City employees, including exempt employees, which

duplicate, supersede or replace State and local law.

2. New Federal personnel processes, procedures and interpretations of uncertain dimensions replace, supersede or duplicate State and City personnel laws and civil service laws.

3. A Federal regulatory agency, the Wage and Hour Division, Department of Labor, is exercising, as of yet indeterminable supervision and controls. These replace, supersede, duplicate and confuse existing State and local personnel agencies, processes and procedures developed under State and City law.

4. New Federal civil and criminal Court enforcement actions, duplicate and exceed State Court actions now provided by State law, and by the Act itself.

5. New personnel appeals are opened to Congress under its newly claimed power to do more and more to regulate wages, hours and other employment conditions of State and City employees, replacing many such appeals now made to City councils and State legislatures.

6. Vast new "uncertainties" are created as to new Federal law interpretations of what constitutes "overtime", "compensable time", compensatory time off in lieu of overtime, "work week", "work period", "tour of duty", dual employment and hundreds of subjects already covered by State and City law.

7. "Uncertainties" exist as to the definition in §3(g) of "employ", the definition of "suffer and permit to work", who is a volunteer, and who is an exempt professional qualifying for special consideration and other areas of specialty employment.

8. With respect to the examples of "uncertainties" in 6 and 7, *supra* new Federal Court class actions are author-

ized for double time, triple time, costs and attorneys fees plus criminal penalties.

9. With 80 to 85 percent of City budgets, a major percent (70 percent in California) of State budgets expended for personnel costs, the impact examples given in items 1 through 8 *supra* demonstrate vast costs from these power shifts, change-overs, and take-overs.

10. There are many other costly requirements which States and Cities will be forced to meet if they are subject to the Act. For example, the Health Maintenance Organization Act requires Fair Labor Standards Act "employers" to offer membership in such an organization to their employees.

11. Loss of ballot box control.

12. Aside from the enormous costs of items such as 1 through 8, *supra,* increased costs have been estimated as follows by Appellants:

a. For the 24 Cities and 10 States referred to in the Complaint – $57,000,000 initially.

b. For fire fighters in 1975 – $200,000,000.

c. For all employees of States and Cities – billions of dollars.

13. State and City debt limit, budget and tax laws may be exceeded by the costs imposed as stated above thus destroying the fiscal integrity of States and Cities.

14. Congress discriminated against States and Cities by imposing upon them awkward and unreasonable regulations designed for private industry. Congress further discriminated against States and Cities by treating Government differently from private industry and by placing all application of the Act to the Federal Government under the Civil Service Commission, an admitted disaster. See *infra* pp. 9, 43-45.

III. APPELLEE'S NON-IMPACT CLAIMS

1. The Act would increase the total wage bill of States and Cities only an estimated 0.3 percent in 1973. (Appellee's Br. 44n.35)

2. The total wage bill increase for States and Cities would be only an estimated 0.5 percent in 1974. (*Ibid*).

3. The increase for overtime compensation only would be less than one percent. (*Ibid.*)

4. Only an alleged unidentified 95,000 State and local employees, out of 11,400,000 would be affected by the 1974 Amendments; minimum pay requirements. (*Id.* 16 n.13).

5. Due to the fact that they now have laws containing such hour and overtime payment provisions, "The actual impact on State and local Governments then of a 40 hour standard, will be 'virtually non-existent'." H.R. Rep. No. 913, 93d Cong., 2d Sess. 29.

6. " . . . Congress extended the Act's requirements . . . only after more than three years of hearings – which indicated that the impact would be small in terms of total payroll." (Brief of Senators Williams and Javits 11).

7. The estimated payroll increased costs to all Cities and States at 0.3 percent would be $128,000,000 in 1973, and at 0.5 percent would be $165,000,000 in 1974. (Appellee's Br. 44 n.35).

8. The Appellee's estimated cost of the new regulations for police and fire fighters would be $27,000,000 for 1975. (App. 596).

9. Appellee's estimates are strictly limited to payroll costs.

10. No cost estimate is attributed by Appellee to the disruption and costs involved in shifts of administrative, Court, and legislative forums newly created by the Act.

11. Appellee does not put a price on injunctive relief, class actions for double time, triple time costs, and attorneys fees, litigation by Appellee, or criminal penalties.

12. Appellee ignores the direct conflicting statement, by the Federal Government's expert, on governmental impact of the Act on Government from its creation of "two standards governing pay and hours of work" and "double recordkeeping and double work, at an extremely high administrative cost producing negligible benefits". *See* statement of Chairman of Civil Service Commission, *infra* p. 9.

13. Appellee argues (Br. 15 n.12, 45 n.36) that revenue sharing, by returning 52 billion dollars in taxes paid by their citizens to States and Cities, pays the cost of the 1974 Amendments and somehow mitigates the admitted impact.[4]

IV. APPELLANTS' FACTS SUPPORTING GOVERNMENT IMPACT STATEMENT

1. Records

Appellee, in claiming no new or dual records are required by the Act and questioning the veracity of Governor Askew's estimate that the new recordkeeping requirements will cost Florida $800,000 (App. 576), makes the following statement:

[4] See *infra* p. 35 n.21.

> "The records contemplated by the Act require only the most basic kind of employment information, which the States and local governments necessarily presently maintain for their own purposes." (Appellee's Br. 47-48)

Appellee's statement is directly refuted by the Chairman of the Civil Service Commission, Robert E. Hampton, certainly an expert on Government and the Act's record requirements, in testimony he gave February 26, 1975, before the Committee on Post Office and Civil Service, U.S. House of Representatives. He testified:

> "I must report also that I have sensed among managers a feeling of mounting pressure from cumbersome, procedural-type requirements that impede the delivery of Government services. Some of these requirements, unfortunately, are imposed by legislation: legislation that neither meets nor recognizes the special circumstances of the Federal service.
>
> "The extension of the Fair Labor Standards Act to Federal employment is a case in point. It adds a new set of complex provisions to the already existing provisions of Title 5. *It creates two standards governing pay and hours of work. It results in double recordkeeping and double work, at an extremely high administrative cost producing negligible benefits.* I can well understand from this one illustration why Federal managers feel a heavy impact from across-the-board statutory and other procedures that limit the exercise of administrative discretion *for little reason.*" (emphasis added).

In fact, the disruption is greater among States and Cities because they were not favored, as was the Federal Government in §6(b) of Pub. L. No. 93-259, with an administrative mechanism preserving civil service law.

One reason for the tremendous cost of recordkeeping required by the Act is that many Government employees who are paid annual or monthly salaries without computation of hours worked must be recorded again on an hourly system (App. 514, 517, 541, 630), often involving computer reprogramming (App. 580).

Clearly, Governor Askew and Chairman Hampton are correct and Appellee is wrong. Clearly, the shift of Government power is costly and continuing as to recordkeeping. New recordkeeping requirements alone (contained in 33 subsections of 29 C.F.R. § 516 as well as 29 C.F.R. § § 519.17, 520.7,521.8,522.7,524.10, 525.13, 530.9, 800.165, 850.3 and stayed 553.21) will create substantial additional administrative costs for all State and local Governments.

The Act (29 U.S.C. § 11(c)) mandates, and Appellee admits (Br. 47 n.39), that records must be kept even with respect to "exempt" employees. See *Mitchell v. Burgess, d.b.a. Coy Gin Co.*, 31 L.C. ¶70.178 (D. Ark. 1956); *McComb v. Consolidated Fisheries Co.*, 75 F. Supp. 798 (D.Del. 1948). This establishes beyond question a claim of congressional constitutional power to impose regulatory controls on every function of every State and every City be it executive, legislative or judicial. This refutes Appellee's claim (Br. 40) in referring to the exemptions that "Congress' sense of appropriate limits to the exercise of its power is evident in the legislation here under review". *See also* Appellee's interpretative rulings on who qualifies as exempt persons, 29 C.F.R. § 541 to § 602, which are contained in 42 pages. Placing these multitudinous interpretations down upon existing State and local law creates a mass of confusion for States and Cities. (App. 167-169). This confusion is illustrated by the differences between the Appellee and Civil Service Commission as to records.

2. Personnel Processes, Procedures, and Interpretations

States and Cities long ago adopted fair and reasonable civil service and other personnel laws. (Complaint ¶21-31, App. 17-23) The Act supersedes or duplicates these State and City laws, causing all the "double work" problems set forth *supra* by the Chairman of the U.S. Civil Service Commission and more, for what Appellee must admit are "negligible benefits".

The Appellee plays down his 691 pages of small print interpretations (Br. 7 n.5), but in a long "introductory statement" (29 C.F.R. § 531.25 (a)) he calls them "official interpretations . . . which will guide them (i.e. the Secretary of Labor and Administrator of the Wage and Hour Division) in the performance of their administrative duties under the Act . . . ".

3. Federal Regulatory Agency

The States and Cities have civil service or personnel commissions which are in part to be superseded or replaced under the Act by the Secretary of Labor and the Administrator of his Wage and Hour Division. The voluminous interpretations and regulations issued by Appellee to date (29 C.F.R. § 500 *et seq.*) and especially the police and fire fighter regulations of December 20, 1974 (App. 592-620) demonstrate that the new regulatory regime will be making hundreds if not thousands of rulings as to the 11.4 million State and City employees. The police and fire fighter "regulations" (App. 593) provide minute rules as to these employees "by which the Administrator of the Wage and Hour Division will determine the compensable hours of work, tour of duty and work period in

applying the Section 7(k) exemption". 29 C.F.R. § 553.2 (App. 600).

This regulation envisions continuous and detailed supervision and decisions by the Administrator.

Since Cities spend some 80 to 85 percent of their budgets, and California 70 percent of its budget, on personnel matters, the complexity, difficulty and great cost of imposing this new agency upon States and Cities is clearly established.

4. New Court Actions

Sections 16 and 17 of the Act create criminal and civil actions to enforce compliance with the Act, expressly including public agencies in its coverage. Government is exposed to new criminal penalties, new class actions for double time, triple time, costs and attorneys fees. Actions by the Secretary of Labor on behalf of State and local Government employees are authorized and Federal District Courts are authorized to issue injunctions to restrain violations.

No facts proving the necessity of imposing these provisions on States and Cities are cited by Appellee.

5. Congressional Appeals

Up to now State and City employees could appeal to their City councils or State legislatures for legislative changes in the terms and conditions of their employment. Cities and their residents had some ballot box control over the results. This shift of power to Congress, if upheld, will effectively eliminate such ballot box control as a citizen of a City or State could look only to his own district's member of Congress and Senators, and not to the other 49 State delegations.

No more powerful instrument for centralization of Government could be devised than these 1974 Amendments to the Act, with State and local employees looking now for improvement in terms and conditions of employment to a Congress and a Federal department which can impose costs with no responsibility for the taxes to meet these costs.

6. Uncertainties

The Act uses many terms not now used in State and local laws and seemingly wipes out many practical arrangements and practices worked out by States and Cities to meet their unique needs. For example, many States and Cities provide compensatory time off for overtime worked. Salt Lake City uses that system for those who clear streets of snow by giving 7,000 hours in compensatory time off in the summer. (Complaint ¶53, App. 74). Other such unique arrangements are set forth in the Complaint for other Cities. (Complaint ¶49-77, App. 73-80). The Appellee's definitions of "overtime" (29 C.F.R. § § 778.0-778.603) are 51 pages of detailed interpretations in the area which is expected to cause Cities and States the most trouble, even though they have such fair laws on this subject now; that the increased payroll cost has been estimated at less than 1 percent. (Appellees Br. 45 n.35).

The term "compensable time" is certain to cause many problems in addition to those caused by the police and fire fighter regulations which prohibit deduction of sleeping and eating time for fire fighters on duty for 24 hours (29 C.F.R. §553.15, App. 615) while

for all other workers who are on duty 24 hours sleeping and eating time may be deducted. (29 C.F.R. § § 785.21, 785.22). As to what constitutes "compensation", Appellee's brief admits that there are questions in this area. For example, whether the cost of uniforms is to be included as compensation is characterized as "depending upon the circumstances." (Br. 48).

Each new term used by the Act or interpretative regulations must be defined each time the Act and State and local law differ; there will be many Court cases to settle these conflicts.

7. Uncertainties as to "Employ"

The Act's § 3(g) definition of "employ" as "to permit or suffer to work" is broad enough to encompass millions of volunteers who are paid a nominal sum, often in lieu of expenses as an administrative convenience. We have developed volunteerism to its highest and best public service at the local level of Government and to a very high level, also, with respect to State Government. While volunteer fire fighters, and volunteers who help direct traffic during school hours are perhaps the largest in number, volunteer boards and commissions, nurses and thousands of other kinds of volunteers exist. While all recognize that a true unpaid volunteer is exempt, many receive nominal cost reimbursements, insurance coverage and similar payments. While State and local law definitions are largely settled due to years of using volunteers, when any of these volunteers now pass over the line from volunteer to employee is an enormous new question under the Act and Appellee's regulations.

Here the Act injects uncertainties into State and local budgetary processes which neither the statutory scheme nor the Labor Department can resolve, and which

therefore must be decided by Courts, including this Court, on a case by case basis. Even Appellee concedes that with respect to volunteerism, "the question whether an individual is an employee or a volunteer is ultimately one for the Courts, and is not a matter for final decision by the Department of Labor" (Br. 49 n.41). It is further stated that questions of how the Act may be enforced against noncomplying States should be considered at a later time "in light of the particular form of enforcement that may be sought" (Br. 62).

8. Uncertainties Create Court Litigation

The variety of State and local Government is such that the "uncertainties" listed in items 6 and 7, *supra*, the overlapping jurisdiction and other overlapping law, interpretations and rulings will keep States and Cities busy in Court on personnel matters. As was stated in the Appellants' jurisdictional Statement, a check through the monthly publication, *Municipal Law Court Decisions*, reveals that approximately one-third of reported cases on City litigation involves personnel. The double time, triple time, attorneys fees and costs authorized by the Act will undoubtedly lead to enormous efforts to solve all personnel questions under the Act rather than under State and local law.

The costs of these were referred to in Defendant's Deposition Exhibit No. 45, a letter from Governor Salmon of Vermont: "For instance, we must hire attorneys on a contractual basis to defend the State against FLSA lawsuits which can be and are being brought by individual employees, labor unions, or the

Department of Labor itself. I cannot reasonably estimate what these service fees might be, although $100 an hour for attorneys fees, as you know, is not uncommon in the labor relations field." (App. 580-581).

9. Inestimable Costs from Power Shift

It is difficult and well nigh impossible to put dollar costs upon the shifts in Government power, duties and responsibilities. That the costs will be great cannot be disputed. The fact that these processes, procedures, costs, actions, decisions and interpretations involve 11.4 million people in 50 States, 18,000 Cities, 3,000 Counties and thousands of special districts and the major item in their budget, refutes the contention that the costs will be "virtually non-existent" as Appellee has contended throughout his brief.

10. Costs Due to Other Legislation Encompassed In the Act

An example is the Health Maintenance Organization Act of 1973, Pub.L. No. 93-222, 87 Stat. 914, 42 U.S.C. §201 *et seq.* which requires employers covered by the Fair Labor Standards Act to "include in any health benefits plan offered to its employees . . . the option of membership in qualified health maintenance organizations". (42 U.S.C. §300e-9(a)). "Failure of any employer . . . to comply . . . shall be considered a willful violation of section 215 of Title 29 [The Fair Labor Standards Act]." (42 U.S.C. §300e-9(c)).

11. Loss of Ballot Box Control

The loss of local ballot box control over State and local Government expenditures is arguably the single greatest impact of the Act on State and City Government. Under constitutional Federalism, the voters of each State, and the voters in 18,000 Cities, 3,000 Counties and the various special districts control their respective budgets, either directly or through the direct representatives they vote for (Pritchard Deposition at 212-219, App. 230-235). The immediate constitutional impact of this seizure of voter power is incalculable and in violation of the reserved powers of the People under the Tenth Amendment to control through their votes expenditures for local and State purposes.

A major value of our republican form of Government has been responsiveness of Government to ballot box control, especially over budgets. The guarantee of a republican form of Government includes this responsiveness to ballot box control. Now Appellee, who is not subject to local or State ballot box control, is given power over the major item in budgets of States and Cities.

Yet this fundamental impact is misapprehended in Appellee's response to Appellants' statement that under the Act, the Federal Government will control the item which constitutes "85 percent of City budgets." Appellee counters that "On the contrary . . . increased costs . . . will amount to less than two percent of total wage costs." (Br. 44). Even assuming *arguendo* increased costs were only 2 percent, the Federal Government would still be asserting present and future control over the item of personnel costs which constitutes 85 percent of City budgets.

But more importantly, the Constitution reserves those decisions on State and City Government to the voters who live in, work in, receive services from, and pay taxes to, those Governments. The People have never given their reserved powers over these local matters to the Congress. The commerce power cannot reasonably be broadened to encompass a usurpation of these powers delegated through their votes by the People to States and Cities. And to take the next step and take away from the People their right to vote on purely local and State expenditures is a giant leap indeed.

The Tenth Amendment reserves to the People all powers not delegated by the People to Federal or State Governments.

A major power so reserved is vote power over vast changes in our constitutional system, be those changes Federal, State or local. Here the Congress has taken from the People their vote power over State and local budgets and service variety and needs, and placed that power in the Secretary of Labor, an unelected Federal political appointee, with power to do all the vast discretionary actions politically popular at the moment. Controls over the private sector to prevent substandard wages and hours are one thing, but controls of the vitals of State and local Governments are another.

A great genius of our Constitution is that new times, new problems, new actions require new examination of old language. The vast change here in removing ballot box control from local and State voters so destroys our system of constitutional Federalism as to fall under this reexamination requirement. Such a change falls under

the Tenth Amendment's reservation of power to the People only to make such a fundamental change in Federal, State and local Government powers.

Representation in Congress was not intended to provide a substitute for this State and local ballot box control.

This major constitutional right, this ballot box control, is just as much a part of the constitutional protection of each citizen of the United States as is free speech, free press, due process and all the other great rights of the Bill of Rights.

12. Appellants' Cost Estimates

The cost figures presented in Appellants' Complaint before the Court below (Complaint ¶48-77, App. 71-82) are an attempt to illustrate the impact of the Act, not just the additional payroll dollars paid in meeting the Act's minimum wage or overtime provisions. As such, they are made in good faith by professional budget planners. To the extent that they can be ascertained by the Complaint and exhibits presented to the Court below (App. 311-585), the initial costs are estimated at $57,000,000 for 24 Cities and 10 States, and $200,000,000 initially nationwide for fire protection services alone (Complaint ¶48, App. 72). To the extent that the above Impact Statement indicates numerous areas of incalculable uncertainties, Appellants are reasonably certain of the "increased costs" to States and Cities from the items described in the above Impact Statement and that their estimate of "billions of dollars per year" is accurate (Complaint ¶148, App. 72).

Appellee's attempt to undermine Appellants' statistics as lacking substantiation (Br. 47) merely echoes a similar attempt made during the Deposition of Mr. Allen E. Pritchard, Jr., to which Mr. Pritchard responded:

> "I don't know that I can – that I should be – should be expected to be in a position to detail every dollar for 15,000 municipalities. It's our practice over 50 years of activity to report the information the same as anybody else would that is given to us by city officials, and it's not the habit of city officials to provide this kind of information and lie about it. "I assume they know what they are talking about." (Pritchard Deposition at 77, App. 138).

In the interest of accuracy it should also be pointed out that the estimates in the Complaint were made by budget experts (Pritchard Deposition at 168, App. 201) working under Mr. Pritchard and Mr. Byrley. As Counsel for Appellee admitted:

> "We did not ask for the experts" (Pritchard Deposition at 225, App. 239).

Mr. Charles Byrley, Executive Director of the National Governors Conference, testified: "Yes, I feel quite confident that that's an accurate statement, that it's going to be in the billions." (Byrley Deposition at 21, App. 260). He testified that while he had not made those calculations, "I have people that have." (Byrley Deposition at 23, 31-33; App. 261, 267-268). Mr. Allen Pritchard, Executive Director of the National League of Cities, did not say that documentation did not exist for the billions figures, just that he himself could not "go through the calculations." (Pritchard Deposition at 233,

App. 245). He did testify that he assumed City reports of costs to him were accurate. (Pritchard Deposition at 152-154, App. 190-191)

Anyone who examines the exhibits from Governors, Mayors, and other City officials will find they are highly credible estimates made by persons not given to the exaggeration of which Appellee accuses them. (App. 311-585).

13. State and Local Debt Limit, Budget, Tax Laws

The above described impacts combine to threaten the ability of State and local Governments to guarantee their fiscal integrity against federally imposed excess expenditures. Since State and local tax, debt and budget laws are powerless to control the Secretary of Labor, the Federal Courts, or Congress, the credit of State and local Governments can no longer be guaranteed for debt repayment. Unlike private industry, additional Government operating costs cannot simply be passed on to the consumer. The "consumer" here is all the People and these People have acted to limit the debt and tax powers of their State or local Government.

The Complaint describes examples of State and City debt, budget and tax laws which they must abide by and under which they sell their bonds by a guarantee not to exceed the limits there fixed. (Complaint ¶¶78-82, App. 82-83).

14. Discriminations against States and Cities

These discriminations are discussed *infra* pp. 43-45.

V. A BALANCING OF THE IMPACT ON CONSTITUTIONAL FEDERALISM OF THE 1974 AMENDMENTS, AND OF THE TRIVIAL IMPACT ON COMMERCE OF STATES AND CITIES PROPOSED TO JUSTIFY THE 1974 AMENDMENTS, SHOWS THE UNCONSTITUTIONALITY OF THE 1974 AMENDMENTS

The Appellee admits (Br. 36) that this Court sits to balance constitutional Federalism against the Congress' basis for acting under the commerce power. Appellants and Appellee differ on whether the 1974 Amendments, in actual effect, "impose any policy objective upon the States or deny to them the power to choose their own objectives" (Br. 37), or the 1974 Amendments merely impose a "minor constraint" of satisfying "very minimum standards as to wages and hours." (*Ibid.*).

Appellee's failure to recognize this case as one of Government power and not just dollars dictates his argument that the 1974 Amendments do not unduly interfere with State and City Governments. The facts set forth *supra* under the "Appellants' Governmental Impact Statement" and Appellee's "Non-Impact Claims" prove Appellee's argument is without foundation in fact.

Appellee's brief assumes that States and Cities have the same status as private persons and private business under the Constitution, in doing his balancing test in resolving the questions of constitutional power here presented. Appellee assumes in his brief that the principles of constitutional Federalism under the facts of this case do not impose any limits on the commerce power. Both assumptions are erroneous.

The questions here should not be considered in a vacuum but in the context of reality. The fact that for the first time in all history States and Cities are on the Department of Labor's list of regulated commercial industries under the Act does not make them commercial enterprises.

The power of Congress under the Commerce Clause is broad indeed when applied to private persons. States and Cities are made the objects of this Act by the Congress, and the fact that States and Cities are given by its words and by its conceptual design, in its entirety a different status from that of private persons under the Constitution must be given paramount weight in resolving the constitutional questions here involved. The Constitution is written to provide State Governments the concept status of a Government. It is not written to provide for the treatment of States under the concept status of economic or commercial entities.

We do not here challenge the nexus to commerce criteria developed in recent decades as the constitutional test for application of Federal economic regulatory control laws to private business under the Commerce Clause.

We do challenge those nexus to commerce "private business" criteria as an improper test when it comes to determining the constitutionality of applying those same Federal economic regulatory control laws under the Commerce Clause to the public's business as carried out by the States and Cities. We respectfully urge that the proper criteria and principles to be applied where governmental powers are involved are not those of nexus to commerce but those of constitutional

Federalism which prohibit undue interference by Federal or State Governments with the governmental acts and actions of the other. From its inception until now our system of Government has recognized that Government interests and powers are different from private interests and powers. We point out that it is these principles of constitutional Federalism which are the historic bases of the continued exemption by Congress of States and Cities from Federal economic regulatory control laws under the Commerce Clause, including in the past the Act here under challenge. These principles have been held by this Court to prohibit Federal or State acts which overly hamper or curtail governmental acts or actions of the other Government. The commerce power is not greater than other powers, such as the power to tax, which have been held to be subject to the principles of constitutional Federalism. All the reasons present in those cases so holding are here. When the balancing test is applied to the facts in this case the commerce power is clearly limited by constitutional Federalism. That a shift of Government power to control wages and hours and other employment terms and conditions of State and City employees from States and Cities to the Federal Government is an important shift of Government power cannot be disputed. Neither can one reasonably conclude that such a shift is not an undue interference with a vital power of State and City Government. Two Secretaries of Labor, one Federal Commission and one President so concluded. (NLC Br. 19-22).

1. The Impact of the 1974 Amendments on States and Cities is not Limited to Money Spent, But Involves a Fundamental Change in Government Power, in Violation of Constitutional Federalism

We are here concerned with all three areas of governmental power in our Nation: the powers of the Federal Government, the powers of the State Government, and the powers of the People. Up until now the People in each State, through their votes for their legislature or in referendums, and in each City, through their Council, Town Meeting, or referendums, have been able to decide through this ballot box control upon the services they need, which are usually unique and varied, and then decide upon taxes to meet the costs of those service needs. The costs are chiefly for personnel. And while the People battle to keep taxes low, the record of fair wages and hours for State and City employees as presented in this case demonstrates that this system works well.

Under the Act we now have a shift in power from the People's State and local ballot box to the Congress where the People of each State or City cannot expect the attention to their unique and varied local and State needs or tax problems. Members of Congress represent other States and Cities which have their own unique and varied needs and problems.

The effect of this shift in power from the people to the Federal Government allows the imposition of increased costs for State and City personnel by the Congress, the Secretary of Labor, or the Federal Courts free from ballot box control by the People in the States and Cities. This shift of power violates the con-

stitutional reservation of power to the People contained in the Tenth Amendment. This nullification of the People's power must be considered in the balancing of power in deciding this case. See *Berman v. Parker*, 348 U.S. 26, 33.[5]

The Federal Government has been able to avoid the interference with its laws[6] which the 1974 Amendments impose on State and City Governments.

While the Civil Service Commission avoids confusion and denudation of Title 5 of the United States Code, State and City Constitutions, laws and personnel practices are subject to the vicissitudes of the Fair Labor Standards Act.

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[5]The Court in *Berman* analogized the power of Congress over the District of Columbia to that of a State over its own affairs. 348 U.S. at 31-32.

[6]For the approach of the Federal Government in preserving its fiscal integrity, see 40 Fed. Reg. 8189 (Feb. 26, 1975), where the Department of Housing and Urban Development declares its relationship with City Governments with rent control legislation:

"[24 C.F.R.] §**403.2 Rental charges.**

"The Department will generally not interfere in the regulation by local rent control boards of rents of unsubsidized projects with mortgages insured or held by HUD. However, HUD will assert exclusive jurisdiction over the regulation of the rents of such a project when the delay or decision of a local rent control authority jeopardizes the Department's economic interest in the project."

The 1974 Amendments do not provide any safeguard for the "economic interest" of States and Cities.

The Civil Service Commission, not the Appellee here, administers the Fair Labor Standards Act's coverage of Federal Government employees. (See NLC Br. 24.) The Civil Service Commission is able to preserve Federal employee law[7] in a way States and Cities are not able to follow. Appellee's failure to promulgate regulations which take into account the unique nature of Government and the extent of the confusion regarding non-police and fire personnel are shown by the detail of the police and fire regulations. (See NLC Br. 25.) Without such guidance for most employees, City and State Governments risk class actions for double and triple damages, other penalties, costs and attorney fees.[8]

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[7]For example, the Act's treatment of "bona fide executive, administrative, or professional capacity," 29 U.S.C. §213(a)(1), creates confusion among States and Cities and conflicts with State and City laws and practices. In order to avoid this conflict and to preserve Federal Civil Service law and practice, the Civil Service

"... Commission will determine these exemptions for most classes of General Schedule and Federal Wage System employees, and will issue criteria for agency determination on other positions." Brown, *Fair Labor Standards and the Public Sector*, 15 Civil Service Journal (No. 1, Jul.-Sep. 1974) 33, 34.

[8]Senator Williams underscored this uncertainty and risk in the debate on the 1974 Amendments (quoted at AFL Br. 19):

"Where the purpose is not employment but voluntary service, the incidentals will not necessarily carry these individuals from the volunteer service into employment. *It would depend on the facts.*" 119 Cong. Rec. S14055 (daily ed., July 19, 1973) (emphasis added).

The Appellee argues (Br. 49 n. 41) that questions of coverage of the Act are for the Courts. In this way, he attempts to avoid Appellants' challenge to the 1974 Amendments as a usurpation of "ballot box control" by the People of elected State and City Government officers.

However, 29 C.F.R. §531.25 states that

> "On matters which have not been determined by the courts, it is necessary for the Secretary of Labor and the Administrator to reach conclusions as to the meaning and the application of provisions of the law in order to carry out their responsibilities of administration and enforcement (Skidmore v. Swift, 323 U.S. 134).
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> * * *
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> "The interpretations of the law contained in this subpart are official interpretations of the Department of Labor with respect to the application under described circumstances of the provisions of law which they discuss. The interpretations indicate, with respect to the methods of paying the compensation required by sections 6 and 7 and the application thereto of the provisions of section 3(m) of the Act, the construction of the law which the Secretary of Labor and the Administrator believe to be correct and which will guide them in the performance of their administrative duties under the Act unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect. Reliance may be placed upon the interpretations as provided in section 10 of the Portal-to-Portal Act (29 U.S.C. 259) so long as they remain effective and are not modified, amended, rescinded, or determined by judicial authority to be incorrect. For discussion of

> section 10 of the Portal-to-Portal Act, see Part 790 of this chapter."

It is in this light, and in light of *Skidmore* that this Court must consider the Appellee's admission (Br. 7 n. 5) that only a small part of 29 C.F.R. Parts 500 to 860 (excluding Part 553 which has been stayed by this Court, Nos. A-553 and A-556, Oct. T. 1974) even remotely concerns State and City Governments.

Senators Williams and Javits argue (Sen. Br. 13) that "the Federal Government has become the dominant fiscal partner while the 'work' of government is carried on primarily at the state-local levels." That the Senators (and the Appellee) can argue this concept of revenue sharing as somehow supporting the constitutionality of the 1974 Amendments shows a fundamental misunderstanding of the effect these Amendments have, not only on the expenditure of money, but on State and City Government decision-making. The "work of Government" of States and Cities under constitutional Federalism should be free of undue Federal interference.

2. Against This Violation of Constitutional Federalism, The Appelle Must Show a Compelling Nexus of State and City Government to Interstate Commerce.

Against the disruption to constitutionally protected Federalism, must be balanced[9] the claims of the

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[9] Appellee is able to argue against the imposition of a higher-than-rational basis test (see NLC Br. 96-108) in this case, only that Federalism is not a "specific Bill of Rights protection" (Sec. Br. 59). Aside from ignoring the language of *United States*

Congress and of the Appellee of a nexus to commerce of the Government activities and operations of States and Cities.

Because the Federal Government, in contrast to State Governments,[10] is a Government of limited powers, *United States v. Cruikshank*, 92 U.S. 543, 551, the higher-than rational basis requirement must relate to the constitutional source of Federal power. In order to sustain the 1974 Amendments against their violation of constitutional Federalism, this Court must find a compelling nexus to commerce.[11]

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v. Carolene Products Co., 304 U.S. 144, 152 n. 4, quoted (Br. 59) immediately above this argument, that a higher test might be triggered by any of the first *ten* amendments, Appellee fails to recognize that Federalism is embodied in the entire Constitution, and is the basis even of the limited Federal powers of Article I, including the commerce power, Art. I, §8, cl. 3.

[10]See *Lake Shore & M.S.R. Co. v. Ohio*, 173 U.S. 285, 291; *Giozza v. Tiernan*, 148 U.S. 657, 661.

[11]Challenged State laws must be supported by a compelling Government interest. *Dunn v. Blumstein*, 405 U.S. 330, 342. However, no Federal Government interest can afford power not provided by the Constitution. There is no Federal "general welfare" power. C.f. *Hoke v. United States*, 227 U.S. 308, 323. Even an emergency cannot create Federal power. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 629 (Douglas, J., concurring).

In *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 371, the Court thus explained the relation between the limited commerce power and the general welfare:

> "The power to prescribe a uniform rule for the transportation industry throughout the country justifies the modification of common law rules by the Safety Applicance Acts and the Employers' Liability Acts

The Appellee proposes as a nexus to commerce supporting the 1974 Amendments, the following: (1) that State and City Governments use goods imported from other States (Br. 13-15); (2) that States and Cities " 'collect taxes and spend money for a variety of purposes' " (Br. 15, quoting S. Rep. No. 690, 93d Cong., 2d Sess. 24); (3) that labor disputes involving States and Cities affect the flow of commerce (Br. 15-18); (4) that States and Cities compete with private industry (Br. 20) and with each other (Br. 21); (5) that States and Cities employ people (Br. 22-24), thus "implicating" (Br. 24) States and Cities in congressional policies of stimulating the economy (Br. 24) welfare reform (Br. 25, 27-28), unemployment assistance (Br. 26), and revenue sharing (Br. 28).

In this list of "a sufficient effect on interstate commerce" (Sec. Br. 12), the Appellee confuses the effect on commerce of the congressional remedial

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> applicable to interstate carriers, and would serve to sustain compensation acts of a broader scope, like those in force in many states. The collateral fact that such a law may produce contentment among employees, – an object which as a separate and independent matter is wholly beyond the power of Congress, – would not, of course, render the legislation unconstitutional.*** The act with which we are concerned seeks to attach to the relation of employer and employee a new incident, without reference to any existing obligation or legal liability, solely in the interest of the employee, with no regard to the conduct of the business, or its safety or efficiency, but purely for social ends."

Therefore, the "compelling" test for Federal legislation concerns the power of Congress to act, i.e., whether the activities of State and City Governments in paying substandard wages have a compelling nexus to and burden on interstate commerce.

legislation with the nexus to commerce of the activities of State and City Government.[12] Unless State and City Governments affect commerce in a compelling way, Congress may not act at all to affect and remedy commerce through legislation.[13]

This is shown by activities of Congress to remedy some of the ills Appellee cites as a pretext for the 1974 Amendments here challenged.[14]

The goal of increasing public employment was addressed by Congress in the Emergency Jobs and Unemployment Assistance Act of 1974,[15] Pub. L. No.

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[12]"The duty of a government to afford protection is limited always by the power it possesses for that purpose." *United States v. Cruikshank*, 92 U.S. 543, 549.

[13]"For who are a free people? Not those over whom government is reasonably and equitably exercised, but those, who live under a government so constitutionally checked and controuled, that proper provision is made against its being otherwise exercised." John Dickinson, *The Letters of a Pennsylvania Farmer* (Nov. 1767).

[14]C.f. Sen. Br. 12:

> "The fact that Congress authorizes and appropriates the funds for such assistance demonstrates both its concern for the budgetary problems of State and local governments and its awareness of the ability of such governments to meet the increased expenditures which the Act's coverage might entail."

[15]Section 101 of the Act inserts the following section, in relevant part, in the Comprehensive Employment and Training Act of 1973, 29 U.S.C. §801 *et seq.*:

> "FINANCIAL ASSISTANCE
>
> "Sec. 602. (a) The Secretary shall enter into arrangements with eligible applicants in accordance with the provisions of this title in order to make financial assistance available for the purpose of providing transitional employment for unemployed and underemployed persons in jobs providing needed public services, and training and manpower services related to such employment which are otherwise unavailable, and enabling such persons to move into employment not supported under this Act.
>
> "(b) Not less than 90 per centum of the funds appropriated pursuant to this title which are used by an eligible applicant for public service employment programs shall be expended only for wages and employment benefits to persons employed in public service jobs pursuant to this title."

93-567, 88 Stat. 1845; and the goal of reducing the effect of unemployment on purchasing power was addressed by Congress in the Emergency Unemployment Compensation Act of 1974,[16] Pub. L. No. 93-572, 88 Stat. 1869. The same Congress which enacted the usurpatious 1974 Amendments to the Fair Labor Standards Act, produced legislation dealing with problems which the Appellee – but not the Congress – declares to have been the basis for the 1974 Amendments to FLSA, but which legislation does not

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[16]The Act provides in relevant part:

> "FEDERAL-STATE AGREEMENTS
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> "Sec. 102. (a) Any State, the State unemployment compensation law of which is approved by the Secretary of Labor (hereinafter in this Act referred to as the 'Secretary') under section 3304 of the Internal Revenue Code of 1954 which desires to do so, may enter into and participate in an agreement with the Secretary under this Act, if such State law contains (as of the date such agreement is entered into) a requirement that extended compensation be payable thereunder as provided by the Federal-State Extended Unemployment Compensation Act of 1970. Any State which is a party to an agreement under this Act may, upon providing thirty days' written notice to the Secretary, terminate such agreement."

violate constitutional Federalism in the way the 1974 Amendments to FLSA do.

The District Court below found that States and Cities covered by the 1974 Amendments do not compete with private industry. (App. 650)[17] C.f. *Wickard v. Filburn*, 317 U.S. 111, 129.[18] Thus, the Appellee is constrained to argue that

> "The Court's finding of a rational basis for the congressional action in *Maryland* [*v. Wirtz*], however, was not based on a finding of competition between public and private employers." (Br. 19).

Appellee ignores this language from the opinion in *Wirtz*, 392 U.S. at 194:

> "... when a State employs people in performing such functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals."[19]

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[17]These functions, in part, are listed in Complaint ¶16, App. 16.

[18]Appellee's argument (Br. 21) that States and Cities compete with each other, has nothing to do with the question whether States and Cities, each of which operates intrastate, are in or affect interstate commerce sufficiently to justify Federal regulatory intervention.

[19]See also NLC Br. 18, quoting from S. Rep. No. 1487, 89th Cong., 2d Sess., 2 U.S. Code Cong. and Adm. News 3010 (1966); and NLC Br. 20.

Of course, the equation by the Court in *Wirtz* of private industry with Government was constitutional error, an error repeated by the Appellee, the labor union and other *amici* in this case. See, e.g., Fla. P.B.A. Br. 7, citing as controlling here, *United States v. Darby*, 312 U.S. 100, 124.

Furthermore, the District Court below doubted whether, without this competition, the result in Wirtz would obtain. (Tr. Dec. 30, 1974 at 97-98).[20]

Appellee refers to *Maryland v. Wirtz*, 392 U.S. 183, 201 (Br. 14) as supporting the argument that a nexus to commerce is shown by States' and Cities' importation of goods.[21] Whether this is a rational or compelling nexus for *this* legislation must be considered with reference to the Fair Labor Standards Act. Section 3(i) of the Act, 29 U.S.C. § 203(i), a provision which predates both *Wirtz* and the 1974 Amendments defines "goods"[22] to exclude:

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[20]The Transcript, not part of the Appendix in Nos. 74-878 and 74-879, is of the District Court's hearing on Plaintiffs National League of Cities, *et al.*'s Application for a Preliminary Injunction, and Defendant Secretary's Motion to Dismiss.

[21]The Appellee in this regard argues (Br. 15 n. 12, 45 n. 36) that purchases by States and Cities are affected by revenue sharing and again that "some of this cost will be borne by the federal government whose aid to State and local governments far exceeds any possible cost of compliance." (Br. 45). Such an argument, that the Federal Government can regulate State and City Government so long as it supplies the dollar cost of regulation, finds no support in the decisions of this Court. Appellee's argument subsumes the question whether the regulation, with or without Federal aid, is constitutional. So, the Court in *Oklahoma v. Civil Service Commission*, 330 U.S. 127, 136, spoke of "the condition that the limitation on the right to receive the funds complied with the Constitution." A Government cannot condition aid on the recipient's abjuration of a constitutional right. *Frost & Frost Co. v. Railroad Comm.*, 271 U.S. 583, 594; *Speiser v. Randall*, 357 U.S. 513, 518; *Sherbert v. Verner*, 374 U.S. 398, 404.

[22]"Goods" is essential to the definition of "Enterprise engaged in commerce or in the production of goods for commerce" in §3(s), 29 U.S.C. §203(s).

"...goods after their delivery into the actual physical possession of the ultimate consumer thereof..."

This Court, therefore, is asked to repeat the mistake of the Court in *Wirtz*, that is, to find as a constitutionally sufficient nexus to commerce for remedial legislation the very fact situation which that remedial legislation exempts from coverage.[23]

3. Appellee's Showing of a Nexus to Commerce Is Trivial; Both the Appellee and the Congress Use This Triviality in an Attempt to Minimize the Impact of the 1974 Amendments.

The "compelling" test, and the Federal interference with Government here challenged, requires that these 1974 Amendments be justified as remedying the specific evil cited as a nexus to commerce. To justify interference with Government, this "minimum wage" Act can stand only upon a compelling showing[24] that (1) State and City Governments pay wages of less than $1.90 per hour[25] in a substantial degree; and (2) these substandard wages substantially affect interstate commerce.

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[23]*Maryland v. Wirtz* expressly left the "ultimate consumer" question open, for a case-by-case determination. See NLC Br. 27-28, quoting *Wirtz*, 392 U.S. at 201. See also NLC Br. 114, citing *Iowa v. Brennan*, No. 73-1565, pending certiorari before this Court.

[24]This compelling showing is not assisted by the usual presumption of constitutionality of legislation. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4.

[25]This is the remedial level of the 1974 Amendments on their effective date, May 1, 1974.

Appellee's incidents of commerce are properly considered by this Court only to the extent that the purported nexus to commerce is addressed by the congressional legislation. The Fair Labor Standards Act forces an increase in wages;[26] it can be supported only by the activities of States and Cities whose alteration by the 1974 Amendments will increase wages.[27]

In *Gulf Oil Corp. v. Copp Paving Co.*, 95 S. Ct. 372, 43 U.S.L.W. 4059, 4063, this Court considered an argument as resting "on a purely formal 'nexus' to commerce."[28] Calling this an "irrational way to proceed," the Court said:

"The justification for an expansive interpretation of the 'in commerce' language... would require courts to look to practical consequences, not to

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[26]For States and Cities, the increase is principally from overtime rather than from the minimum wage provisions, casting further doubt on the constitutional rationality of this "minimum wage" legislation's 1974 Amendments.

[27]The position of Senators Harrison A. Williams and Jacob K. Javits as *amici curiae* is that Congress well considered the impact of the 1974 Amendments and found it to be "small in terms of total payroll". (Sen. Br. 11). To the extent that the 1974 Amendments did not affect Government payrolls, it was not a rational solution to whatever effect those payrolls have on interstate commerce. Taking the Briefs of the Appellee and the Senators together, this Court is asked to conclude: (1) that State and City Government payrolls greatly affect commerce, thus authorizing legislation whose effect on these commerce-affecting payrolls would be slight. In sum, the 1974 Amendments are sought to be preserved by pointing out their ineffectiveness.

[28]As stated by the Court, this nexus to commerce was that: "the highways are instrumentalities of interstate commerce; therefore any conduct of petitioners with respect to an ingredient of a highway is *per se* 'in commerce.' " *Ibid.*

apparent and perhaps nominal connections between commerce and activities that may have no significant economic effect on interstate markets." *Ibid.*

In *Liggett Co. v. Baldridge*, 278 U.S. 105, 112-114, the Court invalidated a State statute requiring that drug stores be under the management of a registered pharmacist. The Court conceded the State's power to act to protect the public health, but found no "real and substantial relation" to this goal in the remedial means chosen. See also *Weaver v. Palmer Bros. Co.*, 270 U.S. 402, 415.

Against the Appellee's *pot pourri* of economic argumentation, not all of which can serve as a nexus to commerce authorizing this congressional legislation,[29] must be set the bases of the Fair Labor Standards Act of 1938 (see NLC Br. 15):

"The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumen-

[29]C.f. Sen. Br. 18:

"It may be added that where a Congressional enactment based on the commerce power is directed, as here, at the overall health of the national economy – a matter inseparable from interstate commerce – then all activities which significantly affect that objective necessarily have sufficient relationship to commerce to be within the ambit of that power."

talities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. The Congress further finds that the employment of persons in domestic service in households affects commerce." c. 676, §2(a), 52 Stat. 1060, 29 U.S.C. §202(a) (1970).

To conform to traditional notions of the commerce power, Appellee must show in today's State and City Government "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." This the Appellee does by citing (Br. 16) the existence of 409,000 State and City Government workers receiving substandard wages. Appellee does nothing to refute the point made earlier (NLC Br. 23) that all but 95,000 of this figure were covered by the Act prior to the 1974 Amendments. In fact, both the Appellee (Br. 43) and Senators Williams and Javits so admit (Sen. Br. 4). Furthermore, the source of the 95,000 figure is "[Labor] Department estimates" without reference to any basis in fact. H.R. Rep. No. 913, 93d Cong., 2d Sess. 28.

As a nexus to commerce, Appellee is left with less than 1% of the 11.4 million State and City Government workers. No showing has been made that any work stoppage by Government employees was attributable to

a failure to pay the FLSA's wage scale. Senators Williams and Javits (Sen. Br. 14) admit there is none.

The Senators (Sen. Br. 15 n. 10) and Alabama *et al.* (Ala. Br. 10 n. 6) find comfort in the existence of strikes among Government workers, as reported in *Work Stoppages in Government, 1972.* Nowhere in this pamphlet are strikes attributed to Government's failure to pay the minimum wage.[30] In fact, the pamphlet attributes the longest strikes to union recognition and security, *Id.* at 1, questions unrelated to wages.

Furthermore, Appellee contradictorily argues (Br. 48 n. 40) that "the dollar impact of the minimum wage requirements would not be 'substantial'."[31] The lack of a substantial effect of the congressional remedy on wages destroys the rationality of Congress' action designed to alleviate evils emanating from substandard wages.[32] Without a substantial or compelling nexus to the wages paid to State and City Government workers, the 1974 Amendments to the Fair Labor Standards Act cannot be supported under the Commerce Clause.

4. Such a Trivial Nexus to Commerce Cannot Support the Unconstitutional 1974 Amendments as an Exercise of a Limited Congressional Power.

Federalism is merely paid lip service in the Appellee's "balancing". (Br. 36). This Court, however, has given

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[30]The minimum wage, as prescribed by the Act, is $3952 per year ($1.90 per hour for 52 weeks of 40 hours).

[31]See also Sen. Br. 7, quoting S. Rep. No. 842, 92d Cong., 2d Sess. 19 and H.R. Rep. No. 913, 93d Cong., 2d Sess. 28.

[32]See Sen. Br. 8, citing an increase in the Government wage bill from this remedial legislation of 0.3%.

due regard for the balance between the Constitution's Federal system and the exercise of a power by the Federal Government.

The balance between constitutionally protected Federalism and congressional legislation under one of the limited powers of Article I of the Constitution, has been struck in tax cases,[33] in regulatory cases and in cases impinging on the fiscal integrity of States and City Governments. Each line of cases is discussed below.

The relationship of noninterference between Federal and State and City Governments is implied from the whole of the Constitution. See *Collector v. Day*, 11 Wall. 113, 123-124; *Graves v. New York*, 306 U.S. 466, 477-478; *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261, 269. Indeed, the only provision of the Constitution empowering congressional action affecting Government is the Guaranty Clause, Art. IV, §4. Even under the Guaranty Clause, State decisions and procedures implementing "ballot box control" by the People have been upheld. See *Coyle v. Smith*, 221 U.S. 559, 567; *Pacific States Tel. & T. Co. v. Oregon*, 223 U.S. 118 (upholding initiative and referendum).

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[33]How little the Appellee (Br. 23) and the Congress (S. Rep. No. 690, 93d Cong., 2d Sess. 24) thought out the fundamental and unique position of Government of States and Cities is shown by the attempt to show as a State and City activity affecting commerce, the collection of taxes. Upon this reasoning, the Federal Government would be empowered to establish the tax rates and tax laws of each State and City. C.f. Appellee's Br. 39.

The gravamen of the tax immunity cases is: who writes the check to pay the tax.[34] If a State or City writes the warrant, the tax is unconstitutional unless

[34]A failure to recognize this fact explains statements such as that at CAPE Br. 17:

> "With respect to the second point, we note that in the factual circumstance closest to the issue involved in this case, the regulation of wages and hours of government employees, the states enjoy no immunity. For, in *Helvering v. Gerhardt,* 304 U.S. 405, it was held that the federal government does have power to tax the income of state employees and state officials."

Earlier (CAPE Br. 5) these unions quote from *Maryland v. Wirtz* and argue thus:

> " 'The Act establishes only a minimum wage and a maximum limit of hours unless overtime wages are paid, and does not otherwise affect the way in which*** duties are performed. Thus appellants' characterization of the question in this case as whether Congress may, under the guise of the commerce power, tell the States how to perform medical and educational functions is not factually accurate.' 392 U.S. at 193, footnotes omitted.
>
> "As the 1974 amendments similarly exclude non-civil service employees who are elected or appointed to policymaking positions or to the personal staffs of elected officials, the present appellants' polemics are also 'not factually accurate.' "

Putting these arguments together, CAPE would urge this Court, in following *Helvering v. Gerhardt,* that, if the salary of a Government officer is taxable or regulable, argument that the Federal Government may not constitutionally tell that Government officer how to discharge his Government duties, is foreclosed. C.f., Appellee's Br. 40, AFL Br. 8, Ala. Br. 16. This reasoning is refuted even by *Gerhardt* itself. 304 U.S. at 420.

the Government involved can be "looked through".[35] See NLC Br. 56, quoting from *Mayo v. United States,* 319 U.S. 441, 447. This reasoning applies to taxes which are nondiscriminatorily applied to Government and industry alike.

The 1974 Amendments to the Act are discriminatory.[36] While a small private industrial enterprise does not come under the Act unless it has gross sales of $250,000 per year, 29 U.S.C. §203(s) (1970),[37] a small State or City Government, with tax receipts under

[35]The Government was "looked through" in *New York v. United States,* 326 U.S. 572, 581, and 587 (Stone, C.J., concurring). See NLC Br. 68. See also NLC Br. 64, citing *South Carolina v. United States,* 199 U.S. 437, and *Ohio v. Helvering,* 292 U.S. 360. The essence of the decision in *New York* is the finding of "an enterprise in which the State sells mineral waters in competition with private waters." 326 U.S. at 581. In this case, the District Court found an absence of such competition with private industry. (App. 650).

[36]In *New York v. United States,* 326 U.S. 572, 583-584, a tax was upheld as applied to States with these words:

> "[We] find no restriction upon Congress to include the States in levying a tax exacted *equally from private persons* upon the same subject matter." (emphasis added).

[37]Section 203(s) defines an "enterprise engaged in commerce or in the production of goods for commerce" as one ". . . and which –

> "(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separatively stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969 is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated);"

$250,000 comes under the Act by virtue of §203(s) of the Act, Pub. L. No. 93-259, §6(a)(5)(E), 88 Stat. 60, (NLC Br. 5a), which by the definitional stroke of the congressional pen seeks to overcome any constitutional limitation on Federal power:

> "The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce."

In answer to Appellants' argument (NLC Br. 118) that Government police and fire personnel are treated by 29 C.F.R. §553.15 less favorably than private employers under 29 C.F.R. §785.21 regarding the treatment of sleeping and eating time as hours worked on a shift of exactly 24 hours, Appellee indicates (Br. 50 n. 43 at the last sentence continued on page 52) that disadvantaged Government police and fire personnel can conform to the private rule. Appellee fails to point out that this requires Government to forsake the §7(k) treatment of police and fire (raising the threshhold of hours per week triggering overtime to 60) of which Appellee makes so much (Br. 7 n. 5).

Therefore, Government is not treated by the Fair Labor Standards Act as fairly as private industry. The reasoning of *New York v. United States* cannot support the application of the Act to any Government activity.

Moreover, the reasoning of *Maryland v. Wirtz*, 392 U.S. at 193-94[38] cannot control this case.

Government is defined by the Act as an "enterprise engaged in commerce"[39] without limitation or justification, a burden not imposed on private industry.

Apart from the discriminatory aspect of the 1974 Amendments, State and City Government cannot constitutionally be regulated by the Act, upon the reasoning of the tax cases. Under the Fair Labor Standards Act, wage checks, including those for unpredictable overtime, are drawn on Government. This was not the case in *Helvering v. Gerhardt:* Appellants have shown that the detriment, the undue interference from the 1974 Amendments is more than "so speculative in its character and measurement as to be insubstantial." *Gerhardt*, 304 U.S. at 421.

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[38] "Congress has 'interfered with' these state functions only to the extent of providing that when a State employs people in performing such functions [operating State schools and hospitals] it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals."

See "Governmental Impact Statement", *supra* pp 4-6, 8-21.

[39] C.f., this response of the majority in *Maryland v. Wirtz* to the fears of the dissenting Justices, 392 U.S. at 196 n. 27:

> "The dissent suggests that by use of an 'enterprise concept' such as that we have upheld here, Congress could under today's decision declare a whole State an 'enterprise' affecting commerce and take over its budgeting activities. This reflects, we think, a misreading of the Act, of Wickard v. Filburn, supra, and of our decision."

The same balancing has been performed in regulation cases, and bankruptcy cases (discussed in Section VI, *infra*). In these cases, as well as the tax cases, undue interference with Government has been avoided. Such is the duty of this Court in this case.

VI. THE APPELLEE'S EXEGESIS OF *MARYLAND V. WIRTZ* CANNOT IMPEL THIS COURT TO FOLLOW *WIRTZ* AS A PRETEXT TO ABROGATE CONSTITUTIONAL FEDERALISM.

The decision in *Maryland v. Wirtz*, 392 U.S. 183, is indispensable to Appellee's argument.[40] Yet the analysis of *Wirtz* and in *Wirtz* is defective in its failure to

[40]See, e.g., CAPE Br. 4. In an effort to foreclose consideration of the interference with Government wrought by the 1974 Amendments, CAPE argues (CAPE Br. 6):

> "In *Maryland* the Court also held that 'the District Court was correct in declining to decide, in the abstract and in general, whether schools and hospitals have employees engaged in commerce or production' (392 U.S. at 201). So too, it would be premature to determine in the abstract whether particular employees of the states or their subdivisions who work elsewhere than in Schools and hospitals are constitutionally covered."

This reasoning would absolve the Congress from the requirement of having any factual basis at all for legislation. In fact, this is what Congress has done in the 1974 Amendments in failing to show (1) that any more substantial percentage than an alleged unidentified 95,000 out of 11.4 million State and City Government employees (0.83%) receive wages less than FLSA's remedial standard and (2) that any labor disruption at all arose because of Government workers' failure to receive FLSA's standard of $3,952 annually ($1.90 per hour for 52 weeks of 40 hours).

consider the uniqueness of Government. (See NLC Br. 26-29.)

In contrast, this Court has considered the uniqueness of Government in both regulatory and bankruptcy cases.

Mr. Justice Holmes speaking for the Court in *Johnson v. Maryland*, 254 U.S. 51, 55-56, analyzed Government, as the Court in *Wirtz* failed to do:

> "The cases upon the regulation of interstate commerce cannot be relied upon as furnishing an answer. They deal with the conduct of private persons in matters in which the states as well as the general government have an interest, and which would be wholly under the control of the states but for the supervening destination and the ultimate purpose of the acts. Here the question is whether the state can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way, at least, the instrumentalities of the United States."

See also, *Gillespie v. Oklahoma*, 257 U.S. 501, 505; *Miller v. Arkansas*, 352 U.S. 187, 190.

The First Circuit, in *Souza v. Travisono*, 43 U.S.L.W. 2402 (Mar. 11, 1975) discussed the unique nature of the State as payer of attorneys fees:

> "The district court erred, however, in awarding fees at the rate of $60 per hour, based on

affidavits of two prominent local attorneys citing returns of $60 and $70 per hour as reasonable. This is not a case in which the attorneys sold their services to a private client willing to pay the market price. The Rhode Island taxpayers, who will ultimately bear the burden, have had no opportunity to pass on either the extent of the services or on the fees."

The reasoning of the bankruptcy case *Ashton v. Water District*, 298 U.S. 513, 530 (see NLC Br. 74), a case preserving the fiscal integrity of State and local Government, must be applied in this case. Undue interference with Government cannot be ignored, as it was in *Wirtz*, as "matters outside judicial cognizance." 392 U.S. at 194 n. 22.[41]

The language in *Wirtz*, 392 U.S. 183, 193-94, that:

"Congress has 'interfered with' these state functions only to the extent of providing that when a State employs people in performing such functions [operating State schools and hospitals] it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals."

is contradicted, upon reason and due consideration of the unique nature of Government, by this Court's statement in *Employees v. Missouri Public Health Dep't*, 411 U.S. 279, 286:

"It is one thing, as in *Parden*, to make a state employee whole; it is quite another to let him recover double against a state. Recalcitrant private employers may be whipped into line in that manner. But we are reluctant to believe that

[41]See Appellee's Br. 44.

Congress in pursuit of a harmonious federalism desired to treat the States so harshly."

The accommodation of State and Federal Government interests should be no different where the Congress has spoken than where the Congress has been silent. See *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 548.

The AFL-CIO argues (AFL Br. 9) that the history of the effect of the 1966 amendments to the Act, since the decision in *Maryland v. Wirtz*, shows the innocuousness of the 1974 Amendments. This reasoning ignores these facts.

Hospitals and schools do not legislate, tax, license or adjudicate. Their powers are limited. Hospitals and schools offer too narrow a perspective of State and City Government for an over-all evaluation of impact of the Act upon the whole of State and local governmental powers.

Any absence of a flood[42] of litigation following the 1966 amendments to the Act is explained by the regularity and certainty of employment of nonexempt school and hospital employees. For other State and City Government employees, newly covered by the 1974 Amendments, flexibility and "stylized operations" (Pritchard Deposition at 123, App. 169) are the norm. Furthermore, most schools and hospitals are run by special districts rather than the States and Cities themselves. This creates a much smaller "enterprise" than do the 1974 Amendments in declaring an entire State or City to be an enterprise. Only with the 1974 Amendments is Justice Douglas' fear (as restated by the

[42]But c.f., *Brennan v. Board of Education*, 374 F. Supp. 817, 819 (D. N.J. 1974) (22 suits against the New Jersey Board of Education under 29 U.S.C. §206(d)).

majority in *Wirtz*) realized: "Congress could under today's decision declare a whole state an 'enterprise' affecting commerce and take over its budgeting activities." *Maryland v. Wirtz*, 392 U.S. at 196 n. 27. Finally, employee suits were inhibited by this Court's decision in *Employees v. Missouri Dep't of Public Health*, 411 U.S. 279. Congress, in the 1974 Amendments, specifically "overruled" this decision. See NLC Br. 130 n. 102.

CONCLUSION

Appellee, and the *amici curiae* supporting the 1974 Amendments, repeat the mistake of *Maryland v. Wirtz* in their failure to distinguish Government from industries in commerce. An Act which usurps the ballot box control accorded the People throughout the Constitution (and which the Federal Government is charged to guarantee), presents a case about Government not about commerce.

The Appellee and the senatorial and labor union proponents of the 1974 Amendments can point to no constitutionally sufficient nexus to commerce of the wage practices of Governments to justify these remedial wage Amendments. Even without reference to the unconstitutional abrogation of our shared Federal system of Government, the 1974 Amendments cannot stand as commerce legislation. Consideration of the impact on Government *qua* Government, of superseding debt and tax constitutional provisions, of undermining the administrative, adjudicatory and fiscal integrity of Government and investor confidence in Government, added to

the dollar cost of these 1974 Amendments to the People as taxpayers, reinforces the conclusion that the 1974 Amendments are irrational as remedial legislation and impels their invalidation. If States and Cities can constitutionally be treated as mere "enterprises" engaging in commerce, our cause must be judged hopeless. But they are Governments, not enterprises; by definition they function in the public interest, not as private entities.

To conclude that *Maryland v. Wirtz* is controlling would be to create a preeminence for the commerce clause that borders on omniscience, without one shred of evidence in our constitutional history that the commerce power was so enshrined.

This is a commerce power case in the sense that Congress waved that rationale before itself in attempting to justify this legislation. It is not a commerce power case when viewed in its totality. The myopic view which *Maryland v. Wirtz* took in looking only to the commerce power must be broadened to include the entire structure of Federalism encompassed by the Constitution. Appellants, by their action herein, request a reaffirmation of constitutional doctrines more deeply rooted than the recent doctrine of *Maryland v. Wirtz*. These doctrines have for over 200 years guaranteed independent State and local governmental operation, thereby assuring balanced Federal-State governmental

cooperation. Nothing in the 1974 Fair Labor Standards Act Amendments should be allowed to obliterate that bicentenarian cooperation.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-878 and 74-879

THE NATIONAL LEAGUE OF CITIES, ET AL., *Appellants*

v.

JOHN T. DUNLOP, SECRETARY OF LABOR

THE STATE OF CALIFORNIA, *Appellant*

v.

JOHN T. DUNLOP, SECRETARY OF LABOR

On Appeals from the United States District Court for the District of Columbia

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

and

BRIEF FOR SENATORS HARRISON A. WILLIAMS, JR. AND JACOB K. JAVITS AS AMICI CURIAE

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On Appeals from the United States District Court for the District of Columbia

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MOTION OF SENATORS HARRISON A. WILLIAMS, JR. AND JACOB K. JAVITS FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

Senators Harrison A. Williams, Jr. and Jacob K. Javits respectfully move this Court for leave to file the accompanying brief as *amici curiae* in support of the position of Appellee, as provided for in Rule 42(3) of the Rules of this Court. The consent of counsel for Appellants in both cases

has been obtained. The Solicitor General has declined to consent on behalf of Appellee, stating that he considers it inappropriate to have presentations made by members of both the Executive and Legislative branches with respect to the meaning and constitutionality of federal legislation.

The question presented by these cases is whether the Fair Labor Standards Amendments of 1974 (Pub. Law 93-259, 88 Stat. 55, amending 29 U.S.C. 201, et seq.), are constitutional insofar as they extend the protections of the Fair Labor Standards Act of 1938 to certain employees of State and local governments. Movants Harrison A. Williams, Jr. and Jacob K. Javits are, respectively, the Chairman and Ranking Minority Member of the Senate Committee on Labor and Public Welfare (as well as its Subcommittee on Labor), which is the Committee of the Senate which drafted the challenged legislation. They were also the chief Senate sponsors and floor managers of this legislation. In addition, by virtue of their Committee positions, they have ongoing responsibilities with respect to both reviewing the implementation of the Fair Labor Standards Act and considering any future amendments of the Act.

Although the constitutional issue presented in these cases was settled by this Court's decision in *Maryland* v. *Wirtz* 392 U.S. 183 (1968), this Court has noted probable jurisdiction and has issued a stay with respect to the application of portions of the 1974 Amendments to State and local governments, on the basis of representations by Appellants which challenge both the factual and legal premises upon which Congress based the legislation and which appear to question the process by which it was developed. Accordingly, movants have a particular interest in responding to Appellants' contentions regarding the consideration given in the legislative process to the need for this legislation and its potential impact on State and local governments.

While it is unusual for members of Congress to participate as *amici curiae*, this Court has granted such motions in other cases (see e.g., *Blanchette* v. *Connecticut General*

Insurance Corp., 95 S.Ct. 335 (1974)), and it is believed that such participation is appropriate in this particular case and will be helpful to the Court.

For the above reasons, this motion to file the accompanying *amici curiae* brief should be granted.

Respectfully submitted,

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BRIEF FOR SENATORS HARRISON A. WILLIAMS, JR. AND JACOB K. JAVITS AS AMICI CURIAE

This brief is filed by Senators Harrison A. Williams, Jr. and Jacob K. Javits, contingent upon the Court's granting the foregoing motion for leave to file a brief as *amici curiae*. Their interest is set out in that motion.

ARGUMENT

The Fair Labor Standards Amendments of 1974 (Pub. Law 93-259, 88 Stat. 55, amending 29 U.S.C. 201, *et seq.*), *inter alia*, extends the protections of the Fair Labor Standards Act of 1938 to certain employees of State and local governments who were not previously covered by the 1966 Amendments to the Act (Pub. Law 89-601, 80 Stat. 830). Consideration of the 1974 Amendments involved almost four years of legislative hearings, committee action and floor debate, during which time the Act's application to State and local government employees, as well as all other issues relating to coverage, exemptions and increases in the minimum wage were thoroughly explored and reviewed.

In this brief we shall show that the constitutional question raised in these cases was settled by this Court in *Maryland* v. *Wirtz,* 392 U.S. 183 (1968)—a decision which Congress expressly relied on in adopting this legislation. In addition, we will demonstrate that contrary to Appellants' contentions, Congress fully considered the potential impact of this legislation on State and local governments, and included special provisions to meet the particular needs of those governments. Finally, we will point out why the 1974 legislation is essential if the Act is to fulfill its intended purposes in light of today's economic realities, and will show that any attempt to distinguish between different types of government employees, in the manner urged by Appellants, would be both inconsistent with the Act's purposes and totally impractical from the standpoint of fashioning workable legislation.

I.

THIS COURT'S DECISION IN MARYLAND v. WIRTZ, UPON WHICH CONGRESS RELIED IN ADOPTING THE 1974 AMENDMENTS, SETTLED THE ISSUE RAISED IN THESE CASES

In *Maryland* v. *Wirtz, supra,* this Court upheld the constitutionality of the Fair Labor Standards Amendments of 1966, which extended the Act's requirements to public hospitals and related institutions, schools and transit services. The Court pointed to the "recognized power of Congress . . . to declare that an entire class of activities affects commerce" (*id.* at 192), and noted that the Congressional determination with respect to schools and hospitals was supported by the facts of record indicating "that such institutions are major users of goods imported from other States" (*id.* at 194). In addition, since "[s]trikes and work stoppages involving employees of schools and hospitals . . . obviously interrupt and burden this flow of goods across state lines," the Court found that "a 'rational basis' exists for congressional action prescribing minimum labor standards for schools and hospitals, as for other importing enterprises" (*id.* at 195).

Thus, the Court concluded that "when a State employs people in performing [its] functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce" (*id.* at 194), and flatly rejected any notion that it should "carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses simply because these enterprises happen to be run by the States for the benefit of their citizens" (*id.* at 198-99).

This decision was expressly relied upon by Congress in its consideration and adoption of that part of the 1974 Amendments which extends the Act's coverage to other public enterprises, and the legislation is well within the Court's rulings.[1] As it had in 1966 with respect to public schools, hospitals, and transit activities, Congress, in dealing with other public enterprises in 1974, exercised its "recognized . . . power . . . to declare that an entire class of activities affect commerce." As stated in the Senate Committee report:

> "there is no doubt that the activities of public sector employers affect interstate commerce and therefore that the Congress may regulate them pursuant to its power to regulate interstate commerce. Without ques-

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[1] See H.Rep. No. 93-913, 93d Cong., 2d Sess., pp. 6-7; H.Rep. No. 93-232, 93d Cong. 1st Sess., p. 6; S.Rep. No. 92-842, 92d Cong., 2d Sess., pp. 18-19; Statements of Senator Javits, 118 Cong. Rec. S24240, July 18, 1972 (daily ed.), and Senator Williams, 118 Cong. Rec. S24949, July 20, 1972 (daily ed.).

As the Court noted with respect to the 1966 Amendments, the 1974 legislation also "specifically exempts any 'employee employed in a bona fide executive, administrative, or professonial capacity' " (392 U.S. at 193). In addition, it excludes elected officials of state or local government, as well as individuals not subject to the civil service laws of their jurisdiction, or who are selected or appointed by elected officials to be members of their personal staffs or to serve on a policy making level or to act as immediate advisers with respect to the constitutional or legal powers of an elected official's office (29 U.S.C. 203(e)(2)(c)). With these exemptions and exclusions the 1974 amendments extend the Act's protections to 3.4 million state and local government employees (as compared to the 2.9 million covered by the 1966 Amendments).

> tion, the activities of government at all levels affect commerce. Governments purchase goods and services on the open market, they collect taxes and spend money for a variety of purposes. In addition, the salaries they pay their employees have an impact both on local economies and on the economy of the nation as a whole. The Committee finds that the volume of wages paid to government employees and the activities and magnitude of all levels of government have an effect on commerce as well." [S. Rep. No. 93-690, 93d Cong., 2d Sess., p. 24.]

See also statements of Senator Williams, which discussed and included a Bureau of Labor Statistics study—*Manpower Impact of Purchases by State and Local Governments*—showing that purchases made by State and local governments in 1971 totalled $135 billion. 119 Cong. Rec. S14056-60, July 19, 1973 (daily ed.).

In view of the nature of our economy it cannot be doubted that a substantial portion of such purchases (as well as the funds used to pay for them)—representing some 13% of the gross national product—must necessarily move in interstate commerce. This conclusion appears not to be disputed in this case since, as the court below pointed out, "it is uncontested that the state and municipal institutions whose employees are reached for the first time by the 1974 Amendments do make substantial purchases in interstate commerce of equipment and other goods" (App. 649).

Given this substantial relationship of state and local government activities to interstate commerce, the same constitutional basis clearly exists for the 1974 Amendments as this Court found in the case of the 1966 Amendments. Accordingly, this Court could strike down the 1974 Amendments only by disavowing its prior rulings upholding legislation which has governed the minimum wage and overtime compensation paid to some 2.9 million public school, hospital and transit employees since 1967. We note that this Court has itself very recently had occasion to point out the inappropriateness of calling into question the constitutional premises of prior decisions where "a great deal of public and private business has been transacted" and where there

has been "major legislation enacted by Congress" in reliance thereon. *United States* v. *Maine*, No. 35 Orig., March 17, 1975, 43 L.W. 4359, 4363.

II.

CONGRESS REASONABLY CONCLUDED THAT EXTENSION OF FAIR LABOR STANDARDS ACT COVERAGE WOULD NOT IMPOSE AN UNDUE BURDEN ON STATE AND LOCAL GOVERNMENTS

A. Congressional Actions Was Based on Well-Documented Studies of Past Experience and Projected Impact, and Took Particular Account of the Special Needs of Police and Fire Departments

Appellants in No. 74-878, in predicting the most dire consequences from the Act's application, contend that "Congress made no credible study of the cost impact of these Amendments to State and local government", and "seemingly acted largely upon the false representations of no impact" (brief, pp. 89, 122-23).

While these are "matters outside judicial cognizance" since a rational basis clearly exists for the legislation (see *Maryland* v. *Wirtz*, 393 U.S. at 194, n. 22), we believe it nevertheless appropriate to demonstrate the inaccuracy of such accusations, in view of the nature of Appellants' attack upon the Congressional action.

At the outset it should be noted, as the Senate Committee report stated, that "[e]ach time Congress has considered minimum wage increases and expansions of coverage under the law, opponents to such action have raised the specter of economic doom," but economic studies prepared after each such action have shown "that the prophecies have proven false" (S.Rep. No. 93-690, 93d Cong., 2d Sess. pp. 9-10; see also statement of Senator Javits, 119 Cong. Rec. S13734, July 17, 1973, daily ed.)

These exercises in specter-raising have particularly characterized the coverage of State and local government employment. For example, in their brief to this Court in *Maryland* v. *Wirtz*, the plaintiff States, who were there challenging the Act's extension to public schools and hospitals, asserted that "[n]ever before in the history of this

nation has the federal government presumed to enact a law which both in theory and in practice, serves as the basis for the utter destruction of the State as a sovereign political entity" (brief for appellants, No. 742, Oct. Term 1967, pp. 9-10). The actual experience in no sense has borne out this grim prophecy.

In 1970 the Department of Labor submitted to Congress detailed studies on the economic effects of the 1966 coverage of schools and hospitals.[2] As pointed out in the Senate Committee report, the conclusion expressed by the Secretary in submitting such studies was that:

> "Overall it can be stated that the educational and hospital sectors have had little evident difficulty adjusting to the minimum wages established by the 1966 Amendments." [S. Rep. No. 92-842, *supra*, p. 19.]

It is significant that although the National League of Cities testified before the Senate Labor Subcommittee in 1971 and the House General Labor Subcommittee in 1973 on this proposed legislation, it made no attempt whatever to refute this conclusion or the data upon which it was based.[3]

Consideration by Congress of extending the Act's coverage to other public enterprises was also preceded by a

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[2] *Economics Effects Studies: Hospitals*, U.S. Dept. of Labor, Wage and Labor Standards Administration, Submitted to the Congress, 1970; *Economic Effects Studies; Educational Institutions*, U.S. Dept. of Labor, Wage and Labor Standards Administration, Submitted to the Congress, 1970.

[3] See Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on S. 1861 and S. 2259, 92d Cong., 1st Sess., pp. 1698-1711; and Hearings before the General Subcommittee on Labor of the House Committee on Education and Labor, on H.R. 4547 and H.R. 2831, 93d Cong., 1st Sess., pp. 148-158.

Other than the testimony of the National League of Cities, and a number of letters received from individual cities mainly concerned with firemen's schedules (see *infra*, p. 10, n.6), no testimony was offered by any State or local government, or association of such governments, during the lengthy hearings held by both the Senate and House on the bills which led to this legislation.

Labor Department study evaluating the feasibility of such an extension. *Nonsupervisory Employees in State and Local Governments*, U.S. Department of Labor, 1971 Report to Congress. One of the findings of this feasibility study was that the impact of extending the Act to other public enterprises would be even less than it had been on schools and hospitals. Thus, as set forth in the Congressional committee reports, the study concluded:

> "The nationwide survey of State and local governments (excluding educational and hospital institutions) indicates that wage levels for State and local government employees not covered by the FLSA are, on the average, substantially higher than those of workers already covered. Hence, if coverage under the FLSA is extended to those workers, comparable minimum wage and overtime standards would not have as great an impact as did the earlier extension of FLSA coverage to employees of State and local government schools, hospitals and residential care establishments." [S. Rep. No. 92-842, *supra*, p. 19; H. Rep. No. 93-913, *supra*, p. 28.]

In its feasibility study the Labor Department had considered the application of the Act's overtime requirements to State and local governments, and had pointed out that "[l]ong work weeks were most prevalent among employees in the public safety activity, which includes police and fire departments", with "[a] fifth of the public safety employees work[ing] over 40 hours" (see H. Rep. 93-913, *supra*, p. 29). In evaluating the overall impact of the overtime provisions, however, the study concluded:

> During the survey week, only 2.3 percent of total nonsupervisory man-hours in State and local governments represented hours worked in excess of 40. If a 40-hour Federal overtime standard were in effect at the time of the survey, the premium pay required for these hours would have approximated one percent of the weekly wage bill. The actual impact of a 40-hour standard would have been less because a substantial proportion of the employees receive premium overtime pay.[4] [H. Rep. No. 93-913, *supra*, p. 29.]

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[4] This last sentence had reference to the fact that the study had shown that "well over two-fifths of the nonsupervisory workforce"

With respect to the prospective impact of a minimum wage requirement, the Labor Department provided Congress in 1973 with updated figures showing that 389,000 state and local government employees were paid less than $1.80 per hour, including 75,000 of those who would be newly covered by the proposed amendments (the latter figure being raised to 95,000 when the proposed minimum wage was increased $1.90 per hour). The total first-year cost of increasing all covered state and local government employees—both those previously covered and those proposed to be covered—to $1.80 per hour was calculated at $128 million, representing an increase of only 0.3% of the total annual wage bill for such governments. See *Background Material on the Fair Labor Standards Act Amendments of 1973,* 93d Cong., 1st Sess., p. 220; S.Rep. No. 93-690, *supra,* p. 24; H. Rep. No. 93-913, *supra,* p. 28.

It is thus clear that Congress was well informed concerning the potential effects of the 1974 Amendments, and, contrary to Appellants' contention, Congress did not act on the assumption that there would be no impact on State and local governments.[5] It is also noteworthy that

of State and local governments were already covered by premium pay provisions for overtime work (see *Nonsupervisory Employees in State and Local Governments, supra,* p. A-46, Table 44).

[5] Appellants' charge that Congress "seemingly acted largely upon the false representations of no impact" (NLC brief, p. 89) apparently has reference to a statement in a House Committee report that "[t]he actual impact on State and local governments . . . of a 40 hour standard will be virtually non-existent" (H.Rep. No. 93-913, 93d Cong., 2d Sess., p. 29). It should be noted that this statement was made at a time when the House bill excluded police and firemen from any overtime pay requirement. The Report noted that a tenth of nonsupervisory employees in State and local government worked over 40 hours during the Labor Department's survey week, but cited the Labor Department's conclusion that a 40-hour overtime standard would cost State and local governments substantially less than 1% of payroll, in view of the substantial number of such employees already receiving premium overtime pay. Pointing out that overtime hours were most prevalent among employees in police and fire departments, the House report quite naturally concluded that in view of their proposed exemption, there would be no significant impact from a 40-hour standard applied to other State and local government employees

the testimony presented by the National League of Cities during the 1971 and 1973 hearings did not significantly contradict the Labor-Department data discussed above.

Although the League did oppose further extension of the Act's coverage to municipal governments on policy and constitutional grounds, and questioned the ability of many municipal governments to absorb or pass on any increased costs, it advised the Congressional committees, on the basis of its own survey, that the impact of the minimum wage requirement would be insubstantial and that the chief concern was with overtime pay for the firemen and policemen. Thus, with regard to the minimum wage, the League advised that of the total work force in the 141 cities that had responded to its survey, "22.2% are below the minimum wage," but that the dollar impact was regarded as "not substantial," the responses from the 141 cities indicating that "the additional cost would be $4.6 million at $2.00 an hour and $20.2 million at $2.25 an hour." With respect to overtime the League stated that its assessment of the potential dollar impact of the Act's coverage "is largely due to police and fire shifts," pointing out that "typically, firemen work 56 hours a week, as many as 24 hours a shift." It was for this reason that "the overtime provisions are of greater concern than the minimum wage," and that the "overriding concern is for firemen, and to a lesser extent, policemen." Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on S.1861 and S.2259, 92d Cong., 1st Sess, pp. 1705-06, and Hearings Before the General Subcommittee on Labor of the House Committee on Education and Labor, on H.R. 4547 and H.R. 2831, 93d Cong., 1st Sess. pp. 153-54.[6]

[6] The League's concern over a proposed overtime standard for firemen who work 56 hours a week was restated in a February 1973 letter to Senator Williams which appears in Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on S. 1861 and S. 1725, 93d Cong., 1st Sess., 160a. Those same Hearings (pp. 225a-269a) also include letters from some individual cities stating that their objections to the proposed legislation were directed at this same problem.

In view of the National League of Cities' repeated statements to Congress that its chief concern was over the application of the 40-hour a week standard to firemen who typically work 24-hour shifts and 56-hour weeks, it is of particular significance that the measure which emerged from the final Senate-House conference was tailored with particular care to meet this very concern. This included the adoption of an entirely new provision—Section 7(k) of the amended Act (29 U.S.C. 207(k))—which, in the case of fire protection and law enforcement personnel, permits a substantial departure from the Act's traditional overtime requirements.

As explained in the Conference Report (S. Rep. 93-758, 93d Cong., 2d Sess., pp. 4-8), this provision is based on a "tour of duty" concept which Congress recognized as more appropriate to the actual working schedules of such personnel than the Act's customary "hours of work" concept. Moreover, it permits overtime to be calculated on the basis of a work cycle of up to 28 days—rather than the Act's customary workweek standard—thus permitting the avoidance of overtime payments through the averaging hours of hours and the granting of compensatory time off within this extended period. In addition, in order to provide ample opportunity to make any necessary adjustments, the overtime standard is applied at a phased-in rate, based upon 240 hours over 28 days—i.e., an average of 60 hours a week—beginning January 1, 1975. The ultimate standard, which will not be reached until January 1, 1978, is based on 216 hours over 28 days—i.e., an average of 54 hours a week—or such lesser number of hours during a 28-day period as the Secretary of Labor's survey shows to be the average tours of duty established by public agencies for fire protection and law enforcement personnel.[7]

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[7] It is clear that Appellants' impact claims take little note of this provision. As pointed out in the Supplementary Affidavit of Jack I. Karlin, Appellants' cost projections are "based upon the assumption that a substantial percentage of the cities whose tours of duty for firefighters do not exceed the maximum hours permitted without premium pay (an average of 60 hours a week) will mistakenly fail to elect the provisions of the . . . Act which will permit them to avoid all overtime pay" (App. 640.)

In short, Congress extended the Act's requirements to those public enterprises not previously covered only after receiving and considering well-documented studies—whose results were never disputed during the consideration of the Amendments although they were the subject of more than three years of hearings—which indicated that the impact would be small in terms of total payroll. In addition, Congress was careful to further soften the impact in the one area—overtime for fire protection and law enforcement personnel—which the representatives of local government had identified as presenting special problems.

B. Through the Appropriation of Federal Funds for Assisting State and Local Governments Congress Was Well Aware of Both Their Budgetary Needs and Their Ability To Meet the Act's Additional Costs

In assessing the ability of State and local governments to meet any cost increases resulting from the Act's coverage, Congress took account of the very substantial amounts of Federal funds contributed to such governments through a variety of revenue sharing and grant-in-aid programs (see, e.g., discussion by Senator Williams during 1972 floor debates (118 Cong. Rec. S24749, July 20, 1972, daily ed.).

The fact is that Federal assistance represents a highly significant and growing portion of the budgets available to State and local governments. According to data summarized in *Trends in Fiscal Federalism, 1954-1974,* Advisory Commission on Intergovernmental Relations, 1975, pp. 2, 21, 27, Federal funds "accounted for 11.4 per cent of state-local general revenue in 1954 [and] expanded to 26.5 per cent of state-local general revenue in 1974." The total of such assistance in Fiscal Year 1974 was $46 billion, and increases are projected to $52.6 billion in Fiscal Year 1975 and $55.6 billion in Fiscal Year 1976 (see Executive

Office of the President, *Special Analyses, Budget of the United States Government, Fiscal Year 1976,* p. 249.

A breakdown of such Federal assistance, appearing at pp. 246-251 of the foregoing publication, shows that such Federal funds flow to a myriad of government activities, including education, law enforcement and correction facilities, highways, water supply, sewerage and sanitation, transit, public welfare, employment security administration, housing and urban development, natural resources, parks and recreation, and libraries—categories which employ well over 90% of State and local government workers.[8]

The fact that Congress authorizes and appropriates the funds for such assistance demonstrates both its concern for the budgetary problems of State and local governments and its awareness of the ability of such governments to meet the increased expenditures which the Act's coverage might entail. This massive amount of Federal assistance also refutes the suggestion repeated throughout Appellants' brief that enactment of the 1974 Amendments deprives State and local jurisdictions of "ballot box control" of their budgets and decisions "on the extent and nature of State and City Government services" (see brief in No. 74-878, p. 113).

In view of the degree of dependence such jurisdictions have upon Federal funds, the notion that but for the Fair Labor Standards Act State and local governments would have absolute dominion over their own budgets and the level of public services they will provide is totally unrealistic. The fact is that whether this Act applies or not, an increasingly significant determinant of the level of State and local governmental activity has been, and will continue to be, the contribution of funds from the Federal government. The situation has been quite accurately summed up by the Advisory Commission on Intergovernmental Relations in its statement that "[t]here has been a sharpening

[8] See *Public Employment in 1973,* U. S. Department of Commerce, Bureau of the Census, pp. 3, 9, 10 for numbers and percentages of State and local government employees in each category of activity.

of roles as the Federal government has become the dominant fiscal partner while the 'work' of government is carried on primarily at the state-local levels" (*Trends in Fiscal Federalism, 1954-1974, supra,* p. 2).

III.

EXTENSION OF THE ACT TO PUBLIC EMPLOYEES IS NECESSARY TO EFFECTUATE THE ACT'S TRADITIONAL OBJECTIVES IN LIGHT OF PRESENT DAY CIRCUMSTANCES

A particularly significant development has been the ongoing—indeed, relentless—movement of employment from private industry to the State and local government sector. As shown by recent Commerce Department data, employment by State and local governments, computed on the basis of full-time equivalent employees, increased from 9.2% of private industry employment in 1955 to 12.7% in 1965, and 14.8% in 1973—an increase from 4.1 million in 1955 to 9.1 million in 1973.[9] As one report to Congress has pointed out, a major factor in this increase "is the proliferation of Federal grant programs resulting from Federal legislation concerning welfare and medical assistance, urban renewal, primary and secondary education, water and air pollution, highway construction, and regional development." *Nonsupervisory Employees in State and Local Government, supra,* p. 42.

This changing character of our national employment patterns underscores the need to cover State and local government employees if the Fair Labor Standards Act is to accomplish its traditional objectives. Indeed, as we show below, fulfillment of those objectives could otherwise be thwarted as the Act becomes applicable to a constantly decreasing portion of the total workforce.

[9] *Trends in Fiscal Federalism,* 1954-1974, *supra,* p. 31. See also data contained in *Manpower Impact of Purchases by State and Local Governments, supra,* appearing in 119 Cong. Rec. S14057, July 19, 1973 (daily ed.), and *Public Employment in 1973,* U. S. Dept. of Commerce, Bureau of Census (1974).

A. Coverage of the Growing Workforce Employed by State and Local Governments Is Warranted by the Act's Objective of Eliminating Substandard Labor Conditions Which Might Otherwise Lead to Disputes Disruptive of Interstate Commerce

As pointed out by this Court in *Maryland* v. *Wirtz,* one of the objectives of the original Act was "to promote labor peace by regulation of . . . wages and hours, out of which disputes frequently arise" (392 U.S. at 191). This same objective was no less present in extending the Act's coverage to employees of State and local governments. The Congressional concern on this score was summarized in Senator Javits' statement during the 1974 floor debates:

> ". . . [W]e are very resentful, very unhappy, when workers in the public domain threaten to strike. This is inevitably the result of the deep feeling that economic justice cannot otherwise be obtained, and I respectfully submit that we will go a lot further in getting tranquility in the labor field by giving them a minimum wage status and an overtime status than in almost any other way I can think of, and prevent the feeling on their part that the only way one can get justice is by rule of the jungle, to wit, by strikes and ceasing essential public services." [120 Cong. Rec. S 2518, February 28, 1974, daily ed.]

Although Appellants claim that the legislative history of the 1974 Amendments contains no express finding that labor disputes involving public employees have an effect on interstate commerce (NLC brief, pp. 22-23), this Court has made clear that no such finding is needed. See *Maryland* v. *Wirtz,* 392 U.S. at 190, n. 13. There is certainly no reason to question the continuing validity of the original Act's finding, reaffirmed in *Maryland* v. *Wirtz,* 392 U.S. at 191, 194-5, that the existence of substandard labor conditions "leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce."

In *Maryland* v. *Wirtz,* this Court readily recognized that "[s]trikes and work stoppages involving employees of schools and hospitals, events which unfortunately are not infrequent, obviously interrupt and burden this flow of goods

across state lines" (392 U.S. at 195). Significantly, the Labor Department release cited by the Court as evidencing the magnitude of the work stoppage problem (see 392 U.S. at 192, n. 25) showed that in 1966 there were 142 work stoppages by employees of state and local government, resulting in a total of 454,840 man-days of work lost. By comparison, for 1972 the same Labor Department source tabulated a total of 375 state and local government work stoppages with 1,257,000 man-days lost, and the data being published for 1973 shows an increase to 386 work stoppages with 2,299,300 man-days lost. *Work Stoppages in Government, 1972,* Report 434, U.S. Department of Labor, Bureau of Labor Statistics, p. 3.[10]

It is obvious, moreover, that work stoppages by government employees disrupt not only the commerce-related activities engaged in by their own agencies, but also the activities in commerce of those private enterprises which are dependent upon a variety of such government services as utilities, police and fire protection, bridge and tunnel operation, sewage and sanitation, road construction and maintenance, and transit services. In addition, the role that State and local government activities now play in the Nation's economy as a whole, including inevitably the level of engagement in interstate commerce, is so significant that interruptions of the normal activities of such government

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[10] Since 1966 the data on total work stoppages at the State and local government level shows as follows:

Year	Number of Stoppages	Man-days Idle
1966	142	455,000
1967	181	1,246,300
1968	251	2,535,600
1969	409	744,600
1970	409	1,375,100
1971	327	893,400
1972	375	1,257,200
1973	386	2,299,300

agencies are bound to have widespread repercussions upon interstate commerce.[11]

Thus, the plain facts are that both the size of the workforce employed by State and local governments and the problems of labor unrest among that workforce have increased markedly in recent years; at the same time the activities of State and local governments and their impact upon the Nation's economy have been expanding. It quite simply was no longer realistic for Congress to ignore this prominent sector of employment in establishing minimum wage and hour standards for American workers, if those standards are to serve their intended purpose.

B. The Act's Further Objective of Benefiting the National Economy by Increasing the Purchasing Power of Low-Paid Workers and Encouraging the Spreading of Available Employment Opportunities Has Equal Application to Both Private and Governmental Employment

In finding, in the original Act, that the existence of substandard labor conditions "burdens commerce and the free flow of goods in commerce," Congress gave expression to another important objective. This was to improve the health of the economy as a whole—and thereby unburden commerce and the free flow of goods—by increasing the purchasing power of lower paid workers through use of the minimum wage and by spreading available work through imposition of a premium on overtime hours. As stated in the House Committee report on the 1938 enactment:

> "America does not suffer from a scarcity of goods or a scarcity of labor, but from a scarcity of purchasing power . . . . The American farm and the American factory could supply much more adequately and abundantly the needs of our people if our people had the wherewithal to buy what the farm and factory can produce . . . . A fair day's pay for a fair day's work will increase the purchasing power of American workers. It will enable them to buy more products from farm and factory. It will give increased employment in industry and on the farm to those now unemployed. (H. Rep. 1452, 75th Cong., 1st Sess., pp. 8-9.)

Similarly, this Court has repeatedly pointed out that "[i]n a period of widespread unemployment . . . the economy inherent in avoiding extra pay was expected to have an appreciable effect on the distribution of available work," and accordingly, that ["r]eduction of hours was a part of the plan from the beginning." *Overnight Motor Transportation Co.* v. *Missel,* 316 U.S. 572, 578 (1942); see also *Walling* v. *Helmerich & Payne,* 323 U.S. 37, 40 (1944); *Southland Gasoline Co.* v. *Bayley,* 319 U.S. 44, 48 (1943).

These purposes similarly motivated the 1974 Amendments and their extensions of coverage. As stated in one of the Senate Committee reports:

> "[By the] establishment of a minimum wage rate . . . [for] workers who do not currently enjoy such protection, and eliminating overtime exemptions where they have been shown to be unnecessary, the economy will be stimulated through the injection of additional consumer spending and the creation of a substantial number of additional jobs." [S. Rep. No. 93-690, 93d Cong., 2d Sess., p. 9.]

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[11] One aspect of this role is documented by a study—*Manpower Impact of Purchases by State and Local Governments, supra*—which was introduced and considered during the Senate debates on the 1974 Amendments. As stated in this study:

> "State and local government purchases have grown substantially in the past decade, and in 1971 accounted for 13 per cent of the Gross National Product in current dollar terms . . . . As a result of this increased rate of spending, State and local governments were a major factor in the generation of jobs during the past decade. In the 1959-71 period, employment generated by State and local government purchases of goods and services accounted for nearly 35 per cent of the increase in jobs, with more than three-quarters of these directly on State and local government payrolls and the remainder primarily in the private sector. In 1971, State and local governments, directly or indirectly, accounted for approximately 16 per cent of the country's total civilian employment. This means that, on the average, each $1 billion of State and local government purchases that year generated almost 100,000 jobs. With the continued channeling of large amounts of Federal funds to States and localities, the spending of State and local governments will continue to create significant demand on the national job market." [119 Cong. Rec. S14056, July 19, 1973, (daily ed.).]

It was recognized, moreover, not only that a higher minimum wage "means increased purchasing power in the hands of the poor and a greater demand for goods and services", but also that "[f]or the Government it means lower welfare costs" (S. Rep. No. 92,842, *supra,* p. 8).

From the point of view of stimulating the economy, there is clearly no distinction to be made between application of the Act to private employment and to government employment. The effect upon the economy of increasing the purchasing power of low paid workers and encouraging the spreading of available employment opportunities is the same in either case. And, since, as we have already emphasized, employment by State and local governments has become an increasingly significant factor, achievement of this Congressional objective could well be frustrated if such employment were not covered.

It may be added that where a Congressional enactment based on the commerce power is directed, as here, at the overall health of the national economy—a matter inseparable from interstate commerce—then all activities which significantly affect that objective necessarily have sufficient relationship to commerce to be within the ambit of that power. This appears to be the teaching of this Court's decision in *Wickard* v. *Filburn,* 317 U.S. 111, 125 (1942), where it was held that insofar as an earlier Congressional enactment was designed to restore the health of the wheat industry, it could reach any activity, "whatever its nature . . . if it exerts a substantial economic effect" on commerce in that commodity.

This Court has also pointed out that "Commerce itself is an intensely practical matter . . . To deal with it effectively Congress must be able to act in terms of economic and financial realities." *North American Co.* v. *Securities and Exchange Comm.,* 327 U.S. 686, 705 (1946). It was on the basis of just such realities that Congress acted in the present instance to reach activities which have a substantial effect upon the entire economy—and hence, the commerce of the Nation.

C. To Attempt To Distinguish Between Activities Which Are "Governmental" and Those Which Are Similar to Activities in Private Enterprise Would Not Only Undercut the Act's Objectives but Would Be Totally Impractical in Application

California argues that the Act should not apply to activities which are "unique" to government, or which have no counterparts or competitors in the private sector (brief, pp. 47, 49). While the Solicitor General will undoubtedly discuss the reasons why such distinctions have no constitutional significance in view of this Court's prior rulings, we wish to stress that any effort to exclude significant portions of public sector employment from the Act's coverage would frustrate the objectives we have previously discussed. Moreover, it is appropriate to point out the utter impracticability of any such distinctions from the point of view of drafting or applying legislation. The simple fact is that the distinctions which California suggests exist, if at all, only in the most theoretical sense; in practical effect, they do not.

A review of the types of activities in which employees of State and local governments are engaged—education, hospitals, health services, utilities, transit operations, highway construction and maintenance, water transportation and terminals, libraries, airport operation, recreation facilities, state liquor stores [12]—readily demonstrates that scarcely any are "unique" to government, but in varying degrees have counterparts in the private sector. See *Indian Towing Company* v. *United States,* 350 U.S. 61, 68 (1955). Even police and fire protection services—which are obviously the main focus of Appellants' concern in this case—have counterparts in private fire prevention and control as well as private guard, detective, security patrol and other protective services.

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[12] See *Public Employment in 1973,* U. S. Department of Commerce, Bureau of the Census, p. 9, Table 3.

Moreover, the actual occupations in which government employees work can almost all be readily identified in private employment.[13]

In such a context we believe it would be absolutely futile to attempt to draft legislation which can distinguish between activities or occupations, on the broad basis suggested by California. Of course, as already pointed out (p. 3, n.1, *supra*), the 1974 Amendments did exclude not only executive, administrative and professional employees generally, but also elected and other policymaking officials. Beyond this, we agree with this Court's conclusion in *Indian Towing Company, supra,* that the "'non-governmental—governmental' quagmire" involves "distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation,"[14] and that any attempt to invoke such distinctions would result in "the inevitable chaos when courts try to apply a rule of law that is inherently unsound" (350 U.S. at 65, 68).

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[13] The point is well illustrated by the State and local government job listings which the Department of Labor's survey found to have entry pay levels below the minimum wage in 1969-70. See *Nonsupervisory Employees in State and Local Government, supra,* pp. 52-57. For example, the complete listing of sub-minimum wage jobs in the Arkansas State government is as follows: "Clerk, cook, custodial worker, dairyman, deckhand, elevator operator, farmworker, fish culturist, food service worker, forest towerman, foster grandparents, groundskeeper, highway bridge tender, housekeeper, keypunch operator trainee, laborer, laboratory aide, linen room worker, messenger, medical assistant, mental retardation aide, museum guide, public health clinic aide, revenue permit agent, seamstress, skill trades helper, social service aide, stock clerk, switchboard operator, trapper, watchman."

[14] The fact that such distinctions are indeed "incapable of being held in the mind" is confirmed by California's attempt to illustrate the types of jobs it regards as "governmental." It is evident that many of the cited activities, including "historian specialists," "fire prevention officers," "highway equipment mechanics," "water use analysts," "airport environmentalists," and "property appraisers" are types of functions which are also performed in the private sector. See Calif. brief, p. 47, n.24.

CONCLUSION

For the reasons stated herein the decision of the Court below should be affirmed.

Respectfully submitted,

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April 1975

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Supreme Court, U.S.
FILED
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Nos. 74-878 and 74-879

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

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FOR THE DISTRICT OF COLUMBIA

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"Fairfax Sets '77 School Budget," *Washington Post*, January 3, 1976, D-1 37

G.E.R.R. (No. 625) at B-17 (Sept. 29, 1975) 49

Grading Schedules For Municipal Fire Protection, Insurance Services Office, New York (1974) 42

Lebar, Worker-Patients: Receiving Therapy or Suffering Peonage?, 62 ABAJ 219 (February 1976) 35

"Local Governments Face Battle of Rising Costs", *Washington Post*, January 1, 1976, F-1 37

Municipal Finance Officers Association Newsletter, Feb. 1, 1976, at 1-2 18

"The Power of Our Judges: Are They Going Too Far?," *U.S. News & World Report*, January 19, 1976 33

"Public Employees Get High, Low Pay," *Washington Post*, September, 1975, A-6 44

"St. E's Patients Now Receive Minimum Pay," *Washington Star*, December 1, 1975, B-6 43

The Rating Game, Report of the Twentieth Century Fund Task Force on Municipal Bond Credit Ratings (1974) 38-39

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The Weekly Bond Buyer, Dec. 22, 1975 at 3 (quoting the December Economic Letter of First National City Bank) 40

U.S. News and World Report, August 18, 1975 39

"Virginia May Lay Off Employees," *Washington Post*, January 3, 1976, D-3 37

Work Stoppages in Government, 1972, Report 434, U.S. Department of Labor, Bureau of Labor Statistics 54

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 74-878 and 74-879

THE NATIONAL LEAGUE OF CITIES, *et al.*,

Appellants,

v.

HON. WILLIAM J. USERY, JR.
Secretary of Labor of the United States,

Appellee.

The State of CALIFORNIA,

Appellant,

v.

HON. WILLIAM J. USERY, JR.
Secretary of Labor of the United States

Appellee.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR APPELLANTS ON REARGUMENT

STATEMENT

Sometime in August 1975, Appellants were notified that Appellee intended to file a Supplemental Brief herein. We believe *Fry v. United States*, 421 U.S. 542, the Solicitor General's intended Brief and the importance of this case to the future of the fiscal integrity of States and Cities all warrant and require this Supplemental Brief by the Appellants. We believe it provides facts–irrefutable facts–that the intrusions of this Act into State and local governmental policy violate the great principles of Federalism as contained both throughout the Constitution of the United States and in the Tenth Amendment to the Constitution. The Act impairs the integrity of the States and Cities and their ability to function effectively in a Federal system.

This Court, speaking through *Fry v. United States*, 421 U.S. 542, 547 n.7 said that the Tenth Amendment:

> "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a Federal system."

In his oral argument on April 16, 1975, in this case Solicitor General Bork made the following concession:

> "I think if this Court ever sees that States are being deprived of political autonomies so that they are no longer vital policy-choosing and policy-making centers, this Court can say the value of Federalism is being impaired and strike down the statute involved." Tr. at 41.

There remain then but two questions to be here decided. Is the budgetary-expenditure function a vital power of State and local Governments? Is that power being impaired by the Act here questioned, thereby

destroying State and local governmental integrity or ability to function effectively in a Federal system?

The first question answers itself. It must be remembered that the activity regulated by these Labor Act Amendments is the payment of wages to government employees, that is, the administration of tax revenues. There is no greater power which government has than its power to tax, to appropriate its resources, to issue bonds, to expend money and to maintain a balanced budget, thereby insuring fiscal integrity. Without this fiscal integrity State and local Governments are unable to function. Fiscal integrity is the cornerstone of governmental integrity.

The second question, one of fact, is best appreciated by examining the reports of Cities themselves. As this brief clearly indicates, the budgetary-expenditure function of State and local Governments is being drastically intruded upon, impacted and impaired by the Act's 1974 Amendments. It is being imminently impaired by the effects here described. It is also being prospectively impaired for present and future citizens by the effects here described. Further, the total impact of this Act threatens to have an incremental effect on the already existent State and local Government fiscal crisis, which could force the default or total decline of some of these Governments.

For example, the City of Chicago, in what it styles a modest estimate, sees the increased cost for fire and police services alone, owing to the Labor Act Amendments, at $100,000,000.00 per year. Other Cities make similar estimates, as their reports–presented here–show.

The Postmaster General reports that the impact of the Act on the Postal Service alone is about $25,000,000.00 annually and may result in the

necessity of reopening negotiations with one of the postal craft unions. (Letter of Postmaster General Benjamin F. Bailar, dated Jan. 5, 1976).

The Attorney General's Office of Indiana found in a 1974 estimate of police and fire overtime alone for the State's Cities, Towns and Special Districts that the additional cost would be $29,426,813.14. This figure does not include Counties, which provide a great deal of additional protective services. After more than two years, this figure has undoubtedly increased substantially.

The Metropolitan Government of Nashville and Davidson County, Tennessee, states that audits and investigations will tie up thousands of man hours:

> "It is difficult to estimate the increased costs. The original estimates that we furnished you probably would be low. One of the serious impacts that we have is that if the Department of Labor is investigating complaints and conducting audits of the operations and the wage records, etc. of the Metropolitan Government, thousands of man hours will be spent by employees of the Metropolitan Government working with the inspectors and investigators of the Wage & Hour Division."

The Act will also mean the elimination of compensatory time altogether:

> "Our budget only provides a certain amount for salaries. Quite often when an employee is required to work over time, we have been giving the employee compensatory time. If we are covered by the Wage & Hour Law, this will be practically eliminated." (Letter from Director of Law Milton H. Sitton, dated Feb. 6, 1976).

As the Argument section of this Brief shows, beyond the Labor Act's impairment of State and City integrity, there is neither a compelling need nor nexus to interstate commerce in States and Cities to support these Amendments.

I.

THE MOST HIGHLY INFORMED AND QUALIFIED ORGANIZATION OF CITIES AND CITY OFFICIALS, ESTIMATES THE COST OF THE 1974 LABOR ACT AMENDMENTS TO CITIES OVER 10,000 POPULATION ALONE, AT OVER $1,000,000,000.00 PER YEAR.

The most complete attempt to determine the true cost of these 1974 Amendments on Cities had been made by the International City Management Association. The ICMA and its Executive Director Mark E. Keane in the regular course of business receive more budget and personnel information from Cities (over 10,000 population) than any other organization.

Certainly the ICMA knows more about the effect of overtime costs on Cities than does the Congress. The Congress' Background Materials on the Fair Labor Standards Act Amendments of 1973, 93d Cong., 1st Sess., 220 (cited in the Appellee's Brief at 16 n. 13), and the House Report (No. 93-913 at 28-19) show that the Appellee's estimate of cost of $128,000,000.00 is based *only* on minimum wages. It does not include overtime payments at all. The House Report's estimate of 1% cost increase owing to overtime was based on a survey by the Appellee of *scheduled workweeks* of State and City employees made in 1970. (H.R. Rep. No. 913, 93d Cong., 2d Sess. 28). The language of the Report shows how simplistic was this survey, and makes clear that the overtime consequences of joint employment, volunteers, seasonal compensatory time, and other City innovations cannot have been considered by the Appellee in 1970 and the Congress in 1974:

"The Department concluded:

> Long workweeks were most prevalent among employees in the public safety activity, which includes police and fire departments. A fifth of the public safety employees worked over 40 hours and they comprised half of the employees on long weekends. Public works was also significant in this regard, employing 27 percent of the workers on long weekends.
>
> During the survey week, only 2.3 percent of total nonsupervisory man-hours in State and local governments represented hours worked in excess of 40. If a 40-hour Federal overtime standard were in effect at the time of the survey, the premium pay required for these hours would have approximated one percent of the weekly wage bill. The actual impact of a 40-hour standard would have been less because a substantial proportion of the employees receive premium overtime pay." H.R. Rep. No. 913, 93d Cong., 2d Sess. 29 (1974).

This clearly shows, beyond doubt, that the evidence relied on by the Congress and the Appellee is absolutely worthless in its failure to consider the impact of the Labor Act's overtime on City and State employment practices, not just scheduled workweeks. It is shocking that such evidence would be the basis of legislation as damaging to Cities as these Labor Act Amendments.

The ICMA, City management experts, considered these City innovations ignored by the Appellee and on which the Act's overtime provisions have the greatest effect; ICMA helped pioneer them. The facts determined by ICMA from reports by City managers who are responsible for City budgets and City personnel are accurate. ICMA's determination is that the cost of the Labor Act Amendments here challenged, to Cities over 10,000 population alone, will be *over one billion dollars* ($1,000,000,000.00) *per year*. The actual cost might be even higher. (See Statement Section I.B. *infra*).

Mr. Keane's letter to this effect is set forth as the Appendix to this Brief.

No Congressional legislation in 200 years has so upset, disrupted or affected States, Cities and Counties as this Act. Counsel have been flooded with information and illustrations of dire consequences. How to deal with this vast amount of material has presented a major problem as already overlong briefs have been filed. But Counsel do feel they have a duty to this Court to at least present a sampling of the latest material that has been pouring in. We believe it illustrates the gravity and nature of the Act's intrusions impairing the governmental acts and services of the States, Cities and Counties. Some information was intentionally requested by Appellant National League of Cities and the International City Management Association after the Solicitor General's notice of his Supplemental Brief in an attempt to develop an organized presentation of this impairment of State and City Government functions by the Act.

On August 27, 1975, the National League of Cities and the International City Management Association sent a joint letter to the City Managers of all Cities across the country with a population greater than 10,000 requesting:

> "1. Any information regarding *actions* you have *taken* in implementing or preparing to implement the provisions of the Act [Fair Labor Standards Act]; and
>
> 2. Any *documents, studies,* or *research* you have prepared in examining the cost of implementing FLSA.
>
> We need as much written documentation as you can provide, both in the form of formal and informal reports."

Hundreds of responses have been received. The City managers' own direct and expert assessments best describe the immediate impairment of State and local Government which this Act will effect. They draw up the budgets of Cities and carry out the public services there provided for. The facts reported by City officials and presented herein[1] show how damagingly false is the Solicitor General's opinion that the Labor Act here challenged is "a law which does not oust a State policy but merely says choose your own policies, there is going to be a slight additional cost in standard working conditions." Tr. Oral Argument, April 16, 1975, at 54. By like distraction, the Solicitor General would have advised that Jason's voyage to Crete was not arduous because he was given a choice between the rock of Scylla and the whirlpool of Charybdis.

The facts assessed and reported by Cities show a great increase in cost, forcing drastic curtailment of services, because of the dire financial situation of today's Cities. The Solicitor General hypothesizes and assumes the effect of the Labor Act on City policies.[2]

---

[1] The facts reported and assessed by City officials charged under State law with coping with these Labor Act Amendments are summarized in the text of this Brief. Quotations from City officials are set forth in footnotes; these were chosen merely as examples of Cities' responses describing the policy curtailment the Labor Act forces on them. These reports from Cities are intended to supplement for the Court the facts already reported by Cities and States in the complaint (App. 6-42), depositions (App. 86-310) and exhibits thereto (App. 311-587).

[2] Unsupported assertion is the very basis for Cities' inclusion within the Labor Act. The *ipse dixit* of Pub. L. No. 93-259, § 6(a)(5)(E), adding 29 U.S.C. § 203(s)(5) states: "The employees of . . . a public agency shall for the purposes of this subsection be *deemed* to be employees engaged in commerce. . . ." (Emphasis added).

Those who operate Cities report the actual effect of the Labor Act on their Cities, and the City policies, desirable to City and employee alike, which must be foregone, without choice by the City and its citizens.

II.

THE EFFECT OF THE 1974 LABOR ACT AMENDMENTS IS TO IMPAIR BOTH THE FISCAL INTEGRITY OF STATES AND CITIES AND THEIR ABILITY TO FUNCTION EFFECTIVELY.

A. To Preserve Local Personnel Policymaking And Be Penalized Therefor With New And Unique Overtime Rules Required By The Labor Act, When Most Cities Have Their Own Rules Adapted To Their Unique Needs, Is Unreasonable And Prohibitively Costly.

The first computation by many Cities was the cost in dollars of doing what the Solicitor General suggests is possible and easy under the Labor Act: comply with no changes or minimal changes in City services. The response of Cities shows how wrong the Solicitor General is. The cost of compliance is tremendous. This cost is entirely overtime payment as distinguished from minimum wage payment. For example, the small City, Burbank, California, estimates a progressively increasing Labor Act cost for fire service until in 1979 the annual cost for fire service alone attributable to the Labor Act, is $1,000,000.00. Similarly, the estimate of the City of

Los Angeles, California, for police and fire alone, for the first year alone, is $8,650,000.00.[3] Other estimates

[3] Burbank, California, reports:

"The Proposed Rules for Police and Fire Personnel under the amended Fair Labor Standards Act present a totally untenable situation for the City of Burbank. Specifically, the problems would arise with Fire personnel. I have attached a copy of a report prepared for the purpose of defining the financial obligations in the next four years of the Act's implementation. The dollars of extra cost, at best, are conservative and in summary are most staggering:

CY 1975–$31,294 additional overtime cost
CY 1976–$59,149 additional overtime cost
CY 1977–$163,889 additional cost for overtime and extra personnel
CY 1978–$920,000 approximate additional costs for extra personnel

"This means that over the next four years, Burbank citizens must bear the brunt of an additional $1,174,000 for increased cost of fire operations and not realize one cent more of additional fire protection for their property. Following the four-year period, the added taxpayer cost will exceed $1,000,000 *each year* for an increase of 43.5 people, as well as continuing overtime. These are costs which apply to one relatively small community (87,000 people) of the many thousands across the country. It is totally unrealistic to even think of the taxpayer burden in the United States if these costs are applied in all communities in the fifty states. It is further unrealistic to think that Congress conceived of this financial burden when the 1974 FLSA amendments were enacted." (Letter of Management Research Officer Edward V. Easter, dated September 12, 1975.)

Los Angeles, California, reports:

"The City has not implemented the provisions of the Fair Labor Standards Act for Fire and Police sworn personnel. If the provisions of the Fair Labor Standards Act are made applicable to these personnel, we estimate that the cost to the City for the 1975-76 fiscal year will be approximately $8,650,000. This estimate is based upon current staffing and manning levels." (Letter of February 13, 1976 from C. Erwin Piper, City Administrative Officer.)

of increased costs for fire service alone range to an increase of 40%.[4]

The estimates[5] of cost of compliance with the Labor Act are in stark contrast to the Solicitor General's

[4] Carmel, Indiana reports:

"The town of Carmel has 24 full-time firemen who in a 28 day period work regular hours as follows:

Two Crews .....216 hours
One Crew .....240 hours

In addition to these regular 24-hour shifts the crew due to report for work the next day reports in to man the stations when those on duty are called out on a fire or first-aid run. On a large fire all off-duty men necessary are called out. These firemen are assisted by nine non-paid volunteer firemen who are mostly available evenings and weekends.

"Should the NLC lose their suit now before the Supreme Court, it would necessitate the Town of Carmel adding 40% more manpower, plus eliminating the off-duty men manning a station when on duty firemen were on a call. Our 1976 budget for firemen's salaries is $316,442.00. To increase the manpower 40% would add $126,576.80 to the budget. In Indiana the tax rate is frozen, therefore, that portion of available funds will cause other operations of government to be cut back. This is a most serious problem in Indiana, as nearly all communities already have problems caused by inflation with no way to take care of the increasing costs." (Letter of Town Manager Neil B. Schmeltekop, dated September 3, 1975.)

[5] Phoenix, Arizona, reports:

"...the additional costs in general employment services, other than public safety, is $100,000 per year based on converting compensatory time to over-time pay.

"...our budget and research staff estimates that these additional costs can be met only by reduction of government services;" (Letter of Employee Relations Specialist Frank D. Wanto, dated September 10, 1975.)

Milwaukee, Wisconsin:

"Even in so small an operation as our Treasurer's Office, with only 40 employees, in one three-month period an expenditure of over $14,000 was made that was not made in the year previously, because of the Fair Labor Standards Act. Satisfactory arrangements for compensatory time off

(continued)

less-than-1% figure for increased overtime cost owing to the Labor Act. Brief for Appellee, 44 n. 35. They rebut

(footnote continued from preceding page)

nad previously been worked out between the employees and the City, to the satisfaction of both." (Letter of City Personnel Director Robert C. Garnier, dated September 15, 1975.)

Des Moines, Iowa:

"Our police and fire budgets would increase approximately $70,000 each if the FLSA was applied. Since the State of Iowa imposes a mill limit and we are operating at that limit, our only alternative would appear to be layoff of public safety personnel and/or reduction of service in other areas." (Letter of Asst. Employee Relations Director Kevin J. Burt, dated September 10, 1975.)

Alton, Illinois:

"This has cost approximately $3,160 per month for the first five months of the fiscal year. This will mean a 4.5% increase in the total payroll over last year when overtime was paid only for call-outs, with compensatory time for extra shifts. Again computer programming changes have been and still are a problem. We now have two hourly rates for salaried personnel in this department—one for regular overtime and one for call-outs. This can only lead to a complete re-evaluation of the entire department at a major cost to the taxpayer, particularly if the decision should be to change to a straight 40-hour workweek. An additional $200,000-$250,000 would be required for payroll for more personnel or one of the five firehouses now in operation might be closed." (Letter of City Comptroller Rita H. Schoeffel, undated.)

Adel, Georgia:

"The implementing of the provisions of the Act have resulted in the loss of a great deal of control in the various departments. Under present conditions it appears the City will have to increase its labor cost (based on present salary schedules) another 16 or 17% within the next year." (Letter of City Manager William F. Pierce, dated December 23, 1975.)

Athens, Tennessee:

"First, the costs of implementing the reduced working hours for firemen will cost the City approximately $75,000.00 more per year for the increase in men in order

(continued)

his contention (Br. 50) that fire service overtime figures will be overstated by failing to account for the §7(k) treatment available for police and firefighters' hours. As

(footnote continued from preceding page)

to reduce the hours worked. This may not seem like a large sum of money, but it certainly is to a smaller city. By having to pay for this increase in salaries, we have had to postpone purchase of a new pumper truck (one of our old trucks has passed the 20 years limit). We feel we are spending this extra money without substantially improving fire protection." (Letter of City Manager M. G. Isbell, dated September 12, 1975.)

Corvallis, Oregon:

"In summary, enforcement of FLSA would cost the City of Corvallis approximately $50,000 if we could afford it. Since our budget cannot absorb this additional expenditure, it will result in a reduction of service levels primarily from elimination of overtime, volunteers, student interns and educational development of current employees." (Letter of Asst. to City Manager Steven C. Burkett, dated September 9, 1975.)

Union City, Tennessee:

"... the amount of $80,593 is the actual impact on our payroll if we had continued our operation that was in force in 1973 with current adjusted salaries." (Letter of City Manager W. D. Frizzell, dated September 5, 1975.)

the report of Los Altos, California, shows,[6] as of January 1, 1976, §7(k)'s 232 hours in a 28-day period[7] will no longer permit a 56-hour week of 24-hour shifts, the most popular and efficient[8] fire schedule now in use throughout the Nation.

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[6] Los Altos, California, reports:

"The greatest impact of this law will be in the operation of our fire department, and the major areas of concern are as follows: Reduce fire suppression workweek to 54 hours—this appears to be the most ridiculous aspect of the law. The predominant workweek for firefighters in California is the 56-hour week on a 24-hour shift basis, and this fits neatly into a 3 shift per nine day cycle. This work arrangement is beneficial to the taxpayers and is quite popular with the fire personnel as evidenced by their opposition where communities have implemented a 40-hour workweek. There is no 24-hour schedule that accommodates the 54-hour week, and we would have to let people off for 2 hours at odd hours of the day, creating a shortage of emergency personnel at those times or pay 2 hours overtime per week to every man. Estimated annual cost for this overtime is $34,600 (for a small department serving 40,000 population)!" (Letter of Chief Administrative Officer S. George Sanregret, dated September 11, 1975.)

[7] Pub. L. No. 93-259, § 6(c)(1)(B).

[8] University Park, Texas, reports:

"An illustration of the costs that cannot be measured is the fact that certain emergency crews are no longer manned during the graveyard shift, from midnight to 8 a.m. in the morning. We now handle all emergencies during that time period on a call-out basis. But obviously the graveyard shift did more than take care of emergencies; they also did certain maintenance items which now are done in a less comprehensive manner or not at all." (Letter of City Manager Leland Nelson, dated September 4, 1975.)

B. The Confusion Of Applying An Act Designed For Commercial Business Enterprises To City Government Makes It Impossible For Cities To Estimate Completely The Cost Of Compliance Which The Labor Act Would Impose On Them.

The computation by Cities of the cost of complying with the Labor Act has been hindered by the vagueness of the standards of the Act and the Appellee's regulations.[9] The Appellee has never applied this Act to Cities. The Congress in passing the 1974 Amendments did not consider the limitless varieties of City employment policies and classification, which do not fit the Act's private-industry scheme. The result has been

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[9] Martinsville, Virginia, reports:

"With respect to this No. 2 on the attached form, a listing of those felt to be exempt was made, but there obviously remains the chance that bureaucratic interpretation and review of our list of exemptions might cause the City to have too few or too many classified as exempt all because of the complexity of the regulations." (Letter of City Manager Thomas B. Noland, dated September 3, 1975.)

such confusion[10] among Cities in attempting merely to plan compliance with the Act as shows the complete inappropriateness of the Act to Cities. For example, most State employees in California are on a 30-day pay cycle. The Labor Act's 28-day cycle, § 7(k), forces dual recordkeeping for fire and police, a tremendous and inestimable administrative and computer cost.

This tremendous confusion (which, by forcing conservative City decisions to avoid the risk of the Act's penalty provisions, exacerbates City financial

[10] Kirkland, Washington, reports:

"One of our serious concerns is the apparent interpretation variances between local Department of Labor offices. Our people have made different statements to us from those in California which are both a little different than in Florida." (Letter of Director of Fire Services Robert H. Ely, dated September 5, 1975.)

Signal Mountain, Tennessee:

"The attachments are in chronological order. A significant thread that you will observe, running through the entire file is a lack of sound information upon which to base budgets, and the need to anticipate the outcome of any litigation concerning the rulings. There has been a need to prepare for almost any eventuality, and to budget accordingly, hoping that we had budgeted reasonably." (Letter of Town Superintendent Lovell J. Morris, Jr., undated.)

Thomasville, Georgia:

"The determination has been made to the best of our ability what employees are exempt–if anyone really knows. It seems that so called experts in this field cannot give any direct answers.

"The overall outcome of these regulations represent chaos to most cities in that a single department would have to be implemented to do nothing but try to interpret these rules and regulations." (Letter of Exec. Secretary to City Manager Elizabeth Prance, undated.)

troubles)[11] itself produces a cost of complying with the Labor Act: the necessity of new and larger personnel staffs.[12] Cities must become further bureaucratized in order to deal with the bureaucrats in Washington who are, by the Labor Act, given control of City personnel practices.

[11] St. Louis, Missouri, reports:

"From the overall standpoint, the major impact of the FLSA, of course, is the increased cost at a time when the City of St. Louis is faced with an already bleak fiscal outlook. The additional drain on the City's revenues caused by the imposition of the Act must inevitably result in cuts in vital municipal services. The most severe impact of the Act from the point of view of individual managers and supervisors is the detailed, complex and inflexible regulations relating to implementation of the Act. These regulations, of course, have been designed for and are based on the Department of Labor's experiences in the private sector. In my opinion, the regulations do not meet the needs of either employees or management in the public service." (Letter of Chief of Classification and Compensation Thomas Sehr, dated September 10, 1975.)

[12] Iola, Kansas, reports:

"In addition, we have experienced no small amount of confusion in seeking to comply with the law, since we are a relatively small organization and do not have a full-time personnel officer. Addition of such an officer would add approximately $10,000.00 to $12,000.00 to the cost listed above." (Letter of City Clerk V. C. Perkins, dated September 5, 1975.)

Corvallis, Oregon:

"The frustration of setting up new and more complex paperwork systems in order to ensure compliance with the law is almost equally damaging in the service reductions." (Letter of Asst. to City Manager Steven C. Burkett, dated September 9, 1975.)

C. The Labor Act's Overtime Requirements Will Not Have The Effect Of Spreading City Employment. The Effect Will Be To Reduce City Employment And City Services.

Since the dollar cost of avoiding changes in City policies was determined to be so great, and because of spending limits on Cities,[13] Cities evaluated reductions and eliminations in services to equal the increased costs in overtime required by the Labor Act. Cities are not able to hire additional employees to avoid overtime payment under the Labor Act. The cost of new employees has become prohibitive. For example, the State of Connecticut reports that fringe benefits increased 17% while salaries increased 5%, with a 10% further increase in fringe benefits expected in fiscal 1976. *Municipal Finance Officers Association Newsletter,* Feb. 1, 1976, at 1-2. This report shows how fair and generous are City and State personnel policies, and that the Labor Act is not needed by them. Cities and States are not able to pay additional amounts in overtime premium. The only alternative is to reduce

[13] Union City, Tennessee, reports:

"We have cut many of our services in order to avoid excessive overtime–normal workweek of 45 hours has been cut to 40; the Fire Division was cut from 72 hours per week to 54, etc. We have not added additional personnel to take care of the change in schedules, therefore in the case of Union City, it has been a cut in services to the public. We had no choice, we simply do not have available funds to continue the service as previously offered." (Letter of City Manager W. D. Frizzell, dated Spetember 5, 1975.)

services.[14] This means immediate increases in fire insurance rates for homeowners, businesses and Cities themselves. (See Section III.B *infra*).

[14] Rockford, Illinois, reports:

"Since the Fair Labor Standards Act went into effect in 1974, it has made it necessary that we change our operating structure for the clerical, blue collar workers, Police Department and Fire Department. It has always been a policy of this City to allow all help to work overtime when needed and either take overtime pay at the rate of time and one-half or compensatory time at the rate of time and one-half. This option has always been left to the employee. This made an arrangement that was satisfactory to the City and also to the employees as they worked when we needed them and they took compensatory time off at such a time when work was slack. This, of course, has caused a necessitated increase in the expenditure of wages.

"In order to make up the deficit caused by this expenditure, an order was issued by the Mayor that a hiring freeze would go into effect so that the cost can be made up. This then cut down the amount of services made available to the public due to the shortage of personnel in the various departments." (Letter of Personnel Director M. Paul Pirrello, dated September 12, 1975.)

For example, elimination of compensatory time off in Milwaukee would force the City to curtail drastically all police protection for four (4) months.[15]

D. The City Policies Which Must Be Altered In Compliance With The Labor Act Are Efficient, Economical, Adapted To City Needs And Agreeable To City Employees.

The City employment policies which become prohibitively costly under the Labor Act, are designed to

[15] Milwaukee, Wisconsin, reports:

"In the first two quarters of this year, our City employees worked a total of 30,000 hours of overtime which was compensated at time and one-half compensatory time off; 20,000 hours of that was worked by our Police department and had the Fair Labor Standards Act been in effect, all of this would have had to have been paid in cash, causing an additional cash outlay in excess of $200,000 above and beyond the present $1,400,000 cash overtime outlay to the Police Department alone. As of the first of September, the Police Chief told the City Council that he had expended all of the cash appropriated for overtime for the fiscal year 1975, and requested of the Council in excess of a half a million dollars for overtime for the remainder of 1975. Due to the financial bind the City of Milwaukee is in, the Council was obliged to refuse this request. The Chief must, therefore recompense this overtime in compensatory time off. If the City were operating under the Fair Labor Standards Act in its Police Department at the present time, police protection for the City of Milwaukee would have to be curtailed for the next four months—even more than it will have to be curtailed as it is. In other words, police protection for the City would have to be reduced by approximately 36,000 hours for the next four months." (Letter of City Personnel Director Robert C. Garnier, dated September 15, 1975.)

serve local Governments and their people, yet treat their employees fairly. They must be eliminated under inflexible law and regulations designed since 1938 only for private commercial enterprises. These City policies are often collectively bargained-for by employees. Cities report their employees are upset by their elimination.[16]

[16] Vacaville, California, reports:

"The opposition to placing local government under the provisions of the Act comes not only from the City but from all four of our employee associations! This to me is a clear indication that the resistance is not merely a matter of administration against it, but rather local government and its employees saying we wish to determine our own work rules, hours and conditions of employment through the traditional meet and confer process. We do not want or need Federal mandates to govern such things." (Letter of Asst. City Manager John Wyro, dated September 4, 1975.)

East Lansing, Michigan:

"We have done away with 'compensatory time', much to the chagrin of our employees who 'resent' the Federal Government telling them what is in their best interests, when they had no input, either through request or collective bargaining." (Letter of Asst. City Manager A. T. Carney, dated September 11, 1975.)

Elimination of these policies, a necessity under the Labor Act, saps morale among employees and reduces their sense of contributing to their home City.[17]

1. Compensatory time off, desired by both Cities and City employees, is effectively prohibited by the Act.

Compensatory time off is applied in situations which have no counterpart in private industry. Real property

[17] Martinsville, Virginia, reports:

"I think my objection to this whole set up is epitomized in the statement of one of our police officers who, upon being advised of these overtime regulations, said, in so many words, 'I object to being told that I can not volunteer my professional service to my employer at any time I may wish to do so over and beyond my regular duty hours, for the good of the department.'" (Letter of City Manager Thomas B. Noland, dated September 3, 1975.)

Sanford, Florida:

"Perhaps the most damaging result of this law being imposed on the small cities was the effect it had on the attitude of the employees. Whereas, before we saw an attitude of cooperation and willingness to contribute their own time and efforts to the betterment of the community and the taxpayers, we now see an attitude in some of the employees of, 'This isn't my job.' and, 'I don't have to work over 40 hours.' etc." (Letter of City Manager W. E Knowles, dated September 12, 1975.)

Monterey Park, California:

"The City employees view the elimination of the opportunity to accumulate compensatory time off as an actual loss of an employee benefit. Employee morale has declined as a result of the FLSA inflexible system of extra duty time compensation." (Letter of City Manager Gerald C. Weeks, dated September 10, 1975.)

assessment,[18] as well as snow removal (App. 457-461), and parks and recreation,[19] are seasonal. Above-normal workloads,[20] which unlike in commercial enterprises

[18] Eau Claire, Wisconsin, reports:

"Being a small City, we must operate with a very limited number of personnel. In order to better serve the public, additional hours are required of personnel at critical periods of time. An example of this is our Assessor's Office. The City Assessor is required by law to meet certain deadlines. This requires additional hours in the spring and less hours in the fall. If we must increase our staff sufficiently to meet the spring needs, we will have excess personnel in the fall. Use of overtime to answer the problem becomes very expensive. Individuals were hired under a situation where they would be allowed to accrue time and take off at a later time. If this practice is discontinued, some of our best employees may look elsewhere for employment." (Letter of Personnel Officer Everett Foss, dated September 11, 1975.)

[19] Oshkosh, Wisconsin, reports:

"The greatest problems encountered were the result of being required to pay time and one-half for hours worked over forty (40) rather than accumulating compensatory time. This problem was most markedly demonstrated in such highly seasonal areas as parks, golf course, bridgetending, etc. In past years, these activities had a workweek in excess of forty (40) hours during the warmer months and were paid comp time for hours over forty. The 'comp time' was then taken off during the colder months when activity in these departments declined. This arrangement had been worked out through the collective bargaining process and was found to be beneficial to both union and management." (Letter of Director of Personnel Norbert W. Sratos, dated September 3, 1975.)

[20] East Lansing, Michigan, reports:

"Our direct costs have increased due to the overtime requirements of after-hour work (which the cities must depend upon for meetings and peak-load built-in requirements of elections, tax billings and proper servicing of the public)." (Letter of Asst. City Manager A.T. Carney, dated September 11, 1975.)

cannot be delayed or smoothed out, have been ameliorated by compensatory time off, which is preferred by City and employees alike.[21]

Seasonal compensatory time off is only one area in which the Solicitor General's blithe assertion that the Labor Act does not force policies on Cities is so demonstrably false. To suggest that Cities have a realistic choice to pay overtime for the 24-hour days of 7-day weeks when snow removal crews must be on stand-by is ludicrous.

Compensatory time off has been one economical State and City policy to pay these employees back. The employees desire compensatory time; unless given within 7 days, Act § 7(a)(1) (or police or fire work period, § 7(k)), the Labor Act forbids it.

2. Volunteerism, unique to Government, is inhibited for City employees by the Act. Because the Act requires overtime for much of this voluntary activity, Cities must eliminate it.

The spirit of volunteerism is inhibited by these Labor Act Amendments. Every City has myriad volunteer boards and commissions, forming a highly participatory democracy. The reports of Cities[22] show how the

[21] See, e.g., report of Los Altos, California, note 6 *supra*.

[22] Englewood, Colorado, reports:

"In the Library, which does not open until 8:30 A.M., many employees who arrive early out of habit would answer incoming calls prior to the starting of work with no thought of compensation. To avoid compliance problems all except exempt personnel were told not to touch a phone prior to 8:30 A.M. even if it went unanswered. The Library also had to hire a fulltime bookmobile driver where before firefighters took turns on their days off driving the vehicle. They afforded the Library a steady and dependable source of drivers but because of the Fair Labor Standards Act, this could no longer be done unless we wanted to pay on an overtime basis.

* * *

(continued)

inflexible, private commercial enterprise rules of the Appellee under the Act, and of the Act itself, inhibit the spirit of civic dedication of City employees, just as they force Cities to eliminate the services volunteered by their employees. The "suffer or permit to work" standard, 29 U.S.C. § 203(g), cannot be applied to Government in any sensible way. But the Act applies it;

(footnote continued from preceding page)

"The City also has the prospect of doing away with its Cadet program, which is a work and educational program geared for recent high school graduates to see if they are interested in police work as a career. The Fair Labor Standards Act brought us under the Age Discrimination Act and we could no longer restrict age for entry to the program. The regional office gave us a ruling that the program is not an apprenticeship and we, therefore, could have a sixty-four year old cadet." (Letter of City Manager Andy McCown, dated September 10, 1975.)

Tigard, Oregon:

"Several activities would be terminated in the area of public relations programs, as most of these are conducted by off duty personnel as a community service, and are non-paid activities. In addition to this activity, many special details are conducted on a volunteer basis, and again are non-paid activities; all of which are job related and a valuable service to the community." (Letter of Chief of Police R.B. Adams, dated September 5, 1975.)

Brewer, Maine:

"The portion of the law in regards to suffer or permit to work would be a great burden on an administration to control on a twenty-four hour day seven days a week basis. Since there would be people who are so dedicated that they would possibly be in and work even when they should not be. A good example would be an off-duty police officer on a day off stops and assists another officer at an accident scene even though he was not ordered to or really needed. This would, I feel, be suffering or permitting to work. Also, this could be abused and again hard to control." (Letter of Chief of Police David P. Koman, dated September 4, 1975.)

and the Appellee says the cost of doing so does not affect the Act's validity. (Brief for Appellee, 44).

The Labor Act discourages training and self-improvement by City employees. Cities report that these programs cannot be continued[23] under the Labor Act's all-inclusive "suffer or permit to work" standard.

This sapping of the volunteer spirit produces inestimable costs and losses,[24] making City predictions of the impact of the Labor Act less terrible than the reality must be..

[23]Wichita, Kansas, reports:

> "We previously required law enforcement personnel to complete certain college credits in Police Science courses. As a result of FLSA, we have had to remove this mandatory requirement to avoid overtime costs. Completion of these college credits is now on a voluntary basis for police personnel." (Letter of City Manager Ralph Wulz, undated.)

Brewer, Maine:

> "This again could result in great budget increases–it would stop dedication to job by personnel as they would not be allowed to give free time when they wished. Training could not even be given on a voluntary basis after work hours as overtime would be applicable. This could have a great impact if training had to be reduced because of increased cost–it would hurt officers' capability and performance." (Letter of Chief of Police David P. Koman, dated September 4, 1975.)

Vacaville, California:

> "Other changes have taken place–an important training program in the Police Department has been discontinued because it was set up on a voluntary basis. In that this is job related, the City would be required to pay the overtime pay portal-to-portal, a cost it cannot incur." (Letter of Asst. City Manager John Wyro, dated September 4, 1975.)

[24]Newport News, Virginia, reports:

> "The FLSA rules and regulations regarding the use of volunteer workers resulted in a loss of their utilization, reflecting a reduction in services for which it is difficult to establish a monetary value." (Letter of City Manager W.E. Lawson, Jr., dated September 15, 1975.)

3. Joint employment is many Cities' greatest problem under the Act. The problem is caused by the Act's definition of an entire Government as a commercial enterprise.

Many City employees work for one City department for pay and for another on a voluntary basis; this is common in Cities with volunteer fire departments. In Cities of all sizes, coaches, athletic officials, counselors and other volunteers often are employed by other City departments. If an entire City Government can rationally be called a commercial enterprise, and the Act's §3(s) "deems" each City to be one, then these voluntary hours are counted to trigger overtime for the compensated hours. City reports[25] show the variety and

[25]White Bear Lake, Minnesota, reports:

> "Our greatest concern is its impact on joint employment in the areas of public safety. White Bear Lake is a community which relies heavily on a Volunteer Fire Department to meet its fire safety needs. As explained in the enclosed letter to Mr. Peter Brennan, Secretary of Labor, the Act directly affects two of our employees in the Fire Department and has caused the City to reconsider the practice of allowing joint employment. In the long run, this may cause us to lose two experienced firemen who hold leadership positions in our Fire Department. We do not believe this to be the intent of the act and would hope for a favorable court ruling."

The letter to former Secretary Brennan from White Bear Lake states:

> "Our fire department currently members fifty volunteers who receive four dollars an hour for time spent on fire calls. The proposed law affects two of the volunteers who are presently employed by the City in our Public Works Department. In both cases, the effects of the overtime provision would require us to pay them at a rate approximately double the present four dollar an hour standard compensation.
>
> Economic conditions will not allow us to increase the hourly rate for the entire department and in fairness to the majority of the volunteers we would be forced to forbid regular City employees from participating as volunteers. In

(continued)

flexibility of this joint employment arrangement, which will be ended under the Act.

(footnote continued from preceding page)

a community of our size, the volunteer fire department serves a vital, public function and we can see no reason why any City employee should be excluded from joining." (Letter of City Manager G. Stevens Bernard, dated December 17, 1974.)

Sanford, Florida:

"The Fair Labor Standards Act had a definite effect on the use of volunteers. The City of Sanford had three or four employees who participated in the City recreation program as volunteer coaches or athletic directors. These people were forced to resign or to stop this activity until we had a clarification on the Fair Labor Standards Act rules from the Department of Labor. We have yet to fully resolve this issue." (Letter of City Manager W.E. Knowles, dated September 12, 1975.)

Vicksburg, Mississippi:

"The municipal water and gas department employed firemen on their off-days to read meters. This enhanced their income, which they needed, and provided the city with meter readers. Again, wage and hour stops them—even though these same men can work elsewhere."

"*Outside Duty For Police Officers:* The minimum per hour pay for off-duty work has been raised to the time-and-one-half rate, thereby making the services of police officers for private patrol duty out of the reach of most organizations, schools, etc. formerly using police personnel." (Letter of Mayor Nat W. Bullard, dated September 8, 1975.)

North Syracuse, New York:

"Our main objection is the effect the FLSA has on our ability to manage. With a government our size, relationships are very close. Our employees have always been salaried and have agreed to work whatever hours are needed to get the job done. Time off is given as needed to compensate for extra time spent and there were no problems. With FLSA, a need for extra time has to be weighed against cost, and bickering between employees and department heads over this issue has hurt morale and productivity. The rule against dual employment means that those who are taking small extra jobs with the Village over and above their full-time positions, have had to be terminated." (Letter of Village Clerk-Treasurer Richard B. Schwab, dated September 5, 1975.)

4. The Labor Act penalizes Cities' progressive pay policies by using them to compute the overtime base.

Not only does the Labor Act force Cities to reduce rather than spread employment, it also discourages progressive City compensation policies. For example, longevity pay must be included in the base pay from which overtime is computed under the Labor Act; this discourages longevity pay, a tool used by Cities to retain experienced employees.[26] 'Incentive programs will

[26]Westminster, Colorado, reports:

"We currently pay our City employees, except Firefighters, overtime at time and one half for work in excess of forty (40) hours in a seven (7) day period. The time and one half is calculated from a base monthly wage and does not include our longevity pay. Under FLSA regulations defining how to calculate overtime we would have to add longevity pay to the calculation. This one aspect of FLSA will cost this City about *$2000–$3000* per year and with inflation it will be a continuing additional cost.

* * *

"Our City compensation policies have been well thought out and we feel they make sense as a whole. The decisions on our current compensation policies would have been structured differently, e.g., we would take another look at longevity, we might organize position responsibilities differently. The regulations and requirements of the FLSA can penalize a City with updated fair compensation policies. For instance many cities don't have longevity pay, on call pay, standby pay, bonus pay and hence their compensation is lower. Knowing that overtime has to be paid based on these costs it is doubtful any city would adopt these practices." (Letter of Personnel Officer Alan P. Miller, dated September 15, 1975.)

no longer be workable;[27] the Act thus will deprive Cities of an antidote for waste and inefficiency.

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[27]Sumter, North Carolina, reports:

"Another important loss to the City would be the Incentive Program which is presently used in our Sanitation Department. Under this program sanitation crews are assigned certain residential areas to pick up each day. If the crew finishes early they go home early; if they finish late they work late. At certain times of the year the workload increases and the hours of the week will probably exceed forty hours making overtime cost necessary. In this case according to law, the City would have to pay overtime at time and one half. However, the law does not take into account the fact that most of the time the employees are working less hours because they finished their routes early. Thus, the effect of the FLSA Law would be to discourage employees from their maximum performance and encourage poor performance in an effort to work overtime hours thus making a greater salary." (Letter of Personnel Director Edward D. Lofton, dated September 5, 1975.)

Charlotte, North Carolina (compliance study):

"Another serious problem created by the FLSA concerns the 'task system' now being used in the Sanitation Division. Whenever a sanitation crew finishes a route, that crew is allowed to go home. In most cases this system results in less than 40 hours of work in a workweek although employees are paid for 40 hours. These employees are paid at one and one-half their base salary rate for all hours worked in excess of 40. The Wage and Hour authorities are contending that the City may not compensate these employees based on 40 hours per week but rather we must base this compensation on the average workweek for the department. For example, in determining the overtime compensation rate prior to the FLSA, an employee's weekly salary rate could be divided by 40 to get the hourly rate. The time and one-half rate was derived from this hourly figure. Under the FLSA the Wage and Hour authorities are contending that since the Sanitation crews only work an average of 35 hours per week, for example, the weekly pay rate must be divided by 35 to determine the hourly rate for computing overtime pay." (Enclosure to Letter of City Manager David A. Burkhalter, dated September 15, 1975.)

5. Students and interns no longer can learn from the Cities; the Labor Act treats them as employees.

The use of interns[28] and students[29] is a common practice of Cities. A living civics lesson, the practice benefits the interns and students more than the City. The Labor Act, by making participation in these programs fully compensable (and fully overtime compensable), penalizes both the Cities and the students and interns.

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[28]Holden, Massachusetts, reports:

"Interns and administrative assistants working with the Town Manager frequently attend night meetings without compensation leaving latitude for compensatory time off. Requiring compensation for these individuals working in the Town Manager's office would assuredly result in the demise of the internship program in Holden." (Letter of Town Manager William A. Kennedy, Jr., dated September 4, 1975.)

East Lansing, Michigan:

"We have closed the door on volunteer or internship programs due to the possible penalty of having to pay for their services in the future, possibly on a back-pay basis." (Letter of Asst. City Manager A.T. Carney, dated September 11, 1975.)

[29]Los Altos, California, reports:

"We maintain a 'student fireman' program at our campus fire station and employ nine college students who make their home at our station while attending school. This program is beneficial to all concerned, especially the students, and would be drastically modified and probably eliminated if we had to comply with provisions of the FLSA for all of the standby hours (sleeping, studying, etc.) while these students are in the fire station. Estimated increased cost for full compliance without modification to the program is $16,200 annually." (Letter of Chief Administrative Officer S. George Sanregret, dated September 11, 1975.)

E. Under The Act, Federal Agencies And Federal Courts Replace City Commissions, State Agencies And State Courts In Reviewing City Employment Policies.

Under the Commerce Clause as perceived by the Congress in these 1974 Amendments and the Solicitor General in this case, where purchase of goods can serve as a pretext for any regulation at all, a case is presented similar to that found ridiculous by The Chief Justice of the United States recently in assessing Federal diversity jurisdiction:

> "... diversity cases have no more place in the federal courts in the second half of the 20th century, and surely not in the final quarter of this century, than overtime parking tickets or speeding on the highways simply because the street or highway is federally financed. This is important because diversity cases represent ¼ of the civil cases in district courts each year. To shift these cases from 400 federal district judges to more than 4,000 judges in state courts of general jurisdiction will impose no undue burden on the states. In any event, non-federal cases must be decided under state law and can best be handled by state judges. They are at least as familiar with that law as federal judges. Appeals in such cases can better be reviewed by those state judges than federal judges from other states. If we really believe what is the subject of so much rhetoric about returning government to the people and to the states, it would help if we had legislative action to match the rhetoric."[30]

Federal duplication of State Court review of State and City employment scheduling makes no more sense;

[30]Address of The Chief Justice of the United States Warren E. Burger to the American Bar Association, February 15, 1976, at 5.

yet that is what the Labor Act requires. It is obvious that employees will use the Federal forum in preference to the State forum, also available under §16(b) of the Labor Act. This is true because of the Act's providing class actions, costs, attorneys' fees, criminal penalties and assistance in any actions from Labor Department employees. The State Courts do a fair and reasonable job, as over half of their City litigation, according to City lawyers, involves personnel matters. Since personnel costs represent 85% of budgets, this is to be expected. These budget costs will not lessen, but will increase with the Federal takeover under this Act. The Federal Courts and this Court, then, can expect to receive the perhaps one-third to one-half of State Court cases involving Cities which concern employment matters.

When these cases come into Federal Courts, and the Federal Courts order State legislatures and City Councils to appropriate monies to pay the increased wage bills attributable to the Labor Act, the public outcry will parallel the response to Federal Court orders to spend $250,000 to repair and renovate Boston high schools to accommodate busing.[31] 'That Federal Courts may be disposed to order the appropriation of monies – even deficit spending, forbidden by most State Constitutions, which would become subservient under the Supremacy Clause to the Federal Labor Act – rather than to permit States and Cities to reduce services in order to balance budgets, is shown by recent Federal Court orders defining adequacy of service and requiring its provision, in jails and hospitals.[32] 'Unlike

[31]*U.S. News and World Report*, Jan. 19, 1976, at 29, 30.

[32]*Id.* at 32, 33.

these school, jail and hospital cases, however, the Federal Courts under the Labor Act will be ordering City budgets not even for the purpose of insuring a minimum wage – Appellants have shown that States and Cities already pay much more than that under State law – but to require unnecessary overtime payments provided by the Labor Act through unique rearrangements and new definitions of employment.

This Federal Court interference with State and City internal management conflicts with this Court's decision in *Rizzo v. Goode*, 44 U.S.L.W. 4095 (Jan. 21, 1976), which was "substantially in agreement" with claims that a Court-ordered plan for handling complaints about police misconduct "represents an unwarranted intrusion by the Federal judiciary into the discretionary authority committed to [the Mayor, Police Commission and other City officials] by State and local law to perform their official functions." *Id.* at 4096.

The prospect of class actions under the Labor Act is not chimerical. *Souder v. Brennan*, 367 F. Supp. 808 (D.D.C. 1973), is such a recent action.[33] The Act, 29 U.S.C. § 16(b), permits, in addition to back wages, "liquidated damages" for these class actions in amounts equal to unpaid wages. This penalty in the guise of liquidated damages is, therefore, unlimited. For employees who are given compensatory time (even at their preference), this wages-plus-overtime-times-penalty formula results in triple-time payments by Cities.

The tenor of Labor Department enforcement of the Labor Act against States and Cities is reflected in a

[33]The class was "the Superintendent of each non-Federal facility for the residential care of the mentally ill and/or mentally retarded, and the chief executive officer or officers of the supervising state agency for mental health and/or mental retardation." 367 F. Supp. at 809.

report of the 1974 annual meeting of the National Association for Mental Health (quoting from the April 1975 issue of *Hospital and Community Psychiatry*). There, the aftermath of the *Souder* case, *supra*, was discussed:

> "Despite lingering questions, the [Labor Department] spokesman stated flatly that a 'patient cannot volunteer to work without pay,' adding that the Labor Department planned to enforce the regulations vigorously and had assigned 'more than a thousand investigators' to see to it that institutions complied with the law, and he said that "if patients were not paid for their work, they could sue for double the amount of back wages plus costs.'" Lebar, Worker-Patients: Receiving Therapy or Suffering Peonage?, 62 ABAJ 219 (February 1976).

If this Labor Department spokesman had also promised class actions, attorneys' fees, costs, and criminal penalties, he would have completed the list of unprecedented sanctions of the Labor Act. Not even the Clean Air Act of 1970, whose sanctions imposed on States (injunctive relief, receivership, civil contempt, and requiring States to allocate funds to finance EPA-ordered undertakings) were forbidden in *Brown v. EPA*, 521 F.2d 827, 831 (9th Cir. 1975), had this panoply including criminal penalties, *Ibid.*

III.

THE LABOR ACT BY ITSELF IMPOSES DEBILITATING COSTS ON STATES AND CITIES. ITS HARMFUL EFFECT IS MAGNIFIED BY THE CURRENT FISCAL CRISIS OF CITIES AND STATES.

The Act, in today's fiscal climate, makes States' and Cities' hard choices worse. This is true, however States and Cities respond to fiscal pressures.

Mayor Walter Washington of the District of Columbia recently stated that when faced with a choice between reduction of City services, the firing of District employees or new taxes for District residents, he would look for the additional money first in the existing budget by cutting or eliminating programs. The greater expense of the employees retained by the City – owing to the Labor Act – requires greater reductions in programs and services.

Other Cities would make different choices. For example, Mayor John Poelker of St. Louis recently stated how he balances the budget when his City's receipts fail to meet expenditures:

> "Well, from time to time we accomplish this by putting a freeze on hiring for the rest of the year in an effort to reduce the anticipated expenditures of the last 3 or 4 months. That is probably the most effective way of getting through a shortfall in revenue because between 80 and 85 percent of local government budgets are related to either salaries or fringe benefits, and the only way you can really attack the shortfall in revenues is by reducing the number of people." Hearings before the Subcommittee on Economic Stabilization of the House Committee on Banking, Currency and Housing, 94th Cong., 1st Sess., at 1529 (Oct. 1975).

Here, the greater expense of retaining City employees – owing to the Labor Act – means fewer will be retained or hired, and fewer services rendered, with existing services curtailed. (Pritchard Deposition at 226-33, App. at 240-45).

So, Governor Mills Godwin of Virginia has said, "I do not see how we can make any further cuts of a substantial nature in our budget without laying off some state employees and reducing salaries." Despite a five percent cut in State spending and a twenty million dollar reduction in State public education aid, the State will face a deficit at the end of the current biennium this June. *Washington Post*, Jan. 3, 1976, D-3.

Furthermore, some of the measures proposed as a means to bridge the fiscal gap would be of no use if the 1974 Amendments were in effect. For example, it has been suggested by the Chairman of the Board of Supervisors of Fairfax County, Virginia, that:

> "Many employees could be cross trained to do jobs other than those they currently hold, which in many cases will eliminate the need to hire new people and will also reduce the risk of layoffs!" *Washington Post*, Jan. 1, 1976, F-3.

Complicated joint employment regulations under the Act, 29 C.F.R. § 791, would prohibit or severely restrict any advantages to be gained from this suggestion.

The primary effects described thus far, are only part of the total impact of this Act. There are larger and longer-term consequences which flow from the reduction or elimination of services, cutbacks in personnel or even from increases in the overall salaries of some employees. As will be here demonstrated, these secondary effects, which often have the capacity to extend into the future, long after an immediate fiscal crisis has passed, further impair the functioning of State and local Governments.

A. The Quality And Quantity Of State And City Government Services Are Factors In Determining Their Credit Rating. This Act Reduces Both, With Great Damage To Both Cities And Citizens.

Of course, in creating potential retroactive liabilities, the 1974 Fair Labor Standards Act Amendments always have the capacity to adversely affect the basic financial and debt data of a City, (see Section III.C *infra*) thus directly influencing an individual Government's credit rating. Since a poor current credit rating bears repercussions for the term of indebtedness, this impact may be felt for as much as twenty years into the future. And with the Act in effect, no City or State can sell its bonds or securities with the current required certifications. There is no way a City, County or State can certify that all governmental agencies which can affect their credit have approved the bonds, the Labor Department having the last word under the Act on City budgets. *See* Appellants' Brief, at 33.

In addition to debt ratios, a State or local Government's credit rating is influenced by the quality and quantity of governmental services provided. As stated by the Report of the Twentieth Century Fund Task Force on Municipal Bond Credit Ratings:

> "Besides . . . basic financial and debt data, the [rating] analyst also considers the economic and social factors:
>
> * * *
>
> The character of a community plays a vital part in its overall evaluation. What are the educational attainments of its residents? What percentage of its homes are owner-occupied? Is there evidence of civic pride, of active community programs for recreation and cultural activities, etc.?

> In examining the indebtedness of a community, weight must be given to its past record: its current indebtedness and future financing needs. Does it have a sound capital improvement program? What is its schedule of debt retirements? Is its borrowing margin within legal debt limitations, etc.?" *The Rating Game*, Report of the Twentieth Century Fund Task Force on Municipal Bond Credit Ratings (1974) at 79.

Recent evidence indicates that the bond market is already being closed to some Governments, and greater distrust of government financial operations is sure to follow in wake of the recent New York City crisis:

> "The following table shows what has happened to yields and prices on the 15 high-grade bonds in Standard & Poor's municipal-bond average over recent months:

	Yield to Maturity	Price per $1,000
March 5	6.43%	$729
April 16	6.69%	$708
May 14	6.73%	$703
June 25	6.82%	$695
July 30	6.95%	$684
August 6	7.03%	$677"

U.S. News and World Report, August 18, 1975 at 12.

The effects of these higher interest rates were recently outlined as follows:

> "When interest rates skyrocket, many communities are prevented from borrowing altogether.
>
> * * *
>
> "The unavailability of necessary capital at reasonable interest rates has had major consequences for the economic recovery which some say is occurring at the present time. Debt financing is used to construct needed public facilities – schools, roads,

mass transit facilities, libraries, hospitals. If the necessary capital is not obtainable through the issuance of municipal bonds, then these needed public facilities do not get built. They get indefinitely postponed. In inflationary times, this means skyrocketing costs which must ultimately be borne by the taxpayer. Moreover, capital improvements projects are needed now – not three years from now – to stimulate economic activity. Construction of public facilities is an effective anti-recession tool." Statement of Mayors Landrieu and Poelker, Hearings before the Subcommittee on Economic Stabilization of the House Committee on Banking, Currency and Housing, 94th Cong., 1st Sess., at 1488 (Oct. 1975).

Furthermore, while under the Act's 1974 Amendments key personnel decisions are no longer in the hands of publicly accountable local leaders, State and local citizens still control much of the revenue-raising of the Governments. They have recently used that control to tighten the purses of local Governments:

"Voters have been rejecting bond issues by sizeable margins since 1972, but this year they turned down an overwhelming 93% of the dollar amount of proposed issues. This is well up from the 54% rejection rate in 1974 and even the 68% rate of 1973, the letter points out." *The Weekly Bond Buyer*, Dec. 22, 1975 at 3 (quoting the December Economic Letter of First National City Bank).

Thus, reduction in services or personnel leads to a poor bond credit rating, reducing government resources and closing the bond market through inability to pay the necessarily higher price for bond dollars. Local Governments are also precluded from bond markets through citizen austerity triggered by poor credit

ratings. This inability to raise revenue forces further cutbacks in services with a further decline in credit reputation. The cycle here depicted is the classic model of a declining City. To the extent that the Fair Labor Standards Act is creating all of the primary effects described in Section II, *supra*, it is a major contributor to this cycle. Constantly, reference is made in financial circles to the changes effected by this Act of ultimate control over State and local budgets by Federal control and the uncertainties thereby created.

B. Reduction In Fire Services Leads To Further Deterioration In Local Government Through Deficient Fire Protection Ratings, Increasing Costs of Homeowner As Well As City Insurance.

Similar to an adverse impact on State or local Government credit ratings, is the adverse impact which the Act has upon a locality's fire insurance rating. Allen Pritchard, Jr. of the National League of Cities described this impact during his deposition in the Court below:

"Well, there is a system known as the fire insurance rating system.

* * *

"When a city tries to determine how much it is going to invest in fire equipment, how many men it is going to put on a pumper, how many hours they are going to work, what kind of investment they make in training, all of those things have to be put on the scale and weighed against what kind of costs are going to be approved for the community as a whole in terms of insurance ratings." Pritchard Deposition 186-87; App. 213-14.

This rating is determined according to standards published by the Insurance Services Office (ISO) which, before enumerating over 12 pages of detailed regulations on fire department staffing alone, states generally:

> "In order to provide reasonable protection, it is necessary that the department have competent leadership; that an adequate number of engine and ladder companies be established and properly located; that these companies be well manned and suitably equipped; and that members be properly trained so they are able to perform their duties effectively. An inadequacy in one or more of these elements adversely affects efficiency and the department's capability in fire suppression." Insurance Services Office, *Grading Schedules For Municipal Fire Protection*, New York (1974) at 24.

Many fire departments, unable to fully fund extensive restructuring of schedules and other Labor Act requirements, have had to reduce personnel (*supra*, at n. 13, 14) delay equipment purchases (*supra*, at n. 5) or eliminate training (*supra*, at n. 22, 23). The result will be an increase in deficiency points under the ISO system. This poorer rating reflects not only a more hazardous area within which to live but also one in which, due to higher insurance rates, it is more expensive to live. It reflects a less proficient fire department and a less desirable community, all due to this Act if it goes into effect.

All of these matters worked out by experience and need on the local level are by the Act suddenly thrown into utter confusion with damage to the people themselves as well as to States and local Governments.

C. The Act's Requirements Dictate An Upward Restructuring Of All Employee Wages.

Another secondary effect stems from increased payroll costs which must be paid because of requirements other than minimum wages under the Act. A major concern is the requirement that overtime be compensated by cash only, thus eliminating compensatory time off. Act § 7(a)(1). A "ripple effect"[34] takes place as increased monetary compensation for some covered workers leaves them making more than their exempt supervisors. This places a further squeeze on already strained State and local budgets when supervisors must also be given increases in salary.

A similar "ripple effect" takes place every time the Congress, the Department of Labor or some Federal Court decides for the first time to include within the Labor Act some heretofore exempt employee, like volunteers, interns, etc. For example, in the recent case of *Souder v. Brennan*, 367 F. Supp. 808 (D.D.C. 1973) it was held for the first time that patients in local mental hospitals were covered under the Act. A recent article describing the effects of this holding on St. Elizabeth's Hospital states:

> " . . . it has incited a bit of jealousy among regular employees who are not entitled to the free meals or free medical care that most patients get." "St. E.'s Patients Now Receive Minimum Pay," *Washington Star*, December 1, 1975, B-6.

The probability of such ripple effects along with higher payroll costs has led some States to curtail or discontinue work therapy programs.

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[34] Pritchard Deposition 10-11; App. 92.

A "ripple effect" may also result where employers may no longer include fringe benefits[35] as part of compensation. This was a practice under some existing State and local Civil Service laws (*supra* at n. 26). Now, since the fringe benefits are protected by contract, they may not be reduced. However, under the Fair Labor Standards Act, neither may they be counted as compensation (29 CFR § 548). The result is a raise to some employees giving them more total compensation (including fringes) than their supervisors. The "ripple effect" then spreads this increase throughout the entire pay scale structure.

D. The Act's Harmful Impact May Result In The Bankruptcy Of Some Local Governments, As A Former Appellee Here Admits.

The tremendous costs that will have to be incurred as a result of the extension of the Fair Labor Standards Act to State and local Governments will surely intensify existing chronic fiscal ailments, the dual pressures of inflation and recession, and the population shifts into and out of localities causing severe budget adjustment problems. This was recognized by Secretary Brennan, formerly the Appellee here. *See*, Appellants Brief 20-21.

Because the expense of providing necessary services has risen dramatically due to inflation, and revenues have simply not kept pace,[36] any policy tending to raise

[35]"The area in which public employees have had the most conspicuous success is in fringe benefits, particularly pensions," "Public Employees Get High, Low Pay," *Washington Post*, September 3, 1975, A-6. See Section II. C, *supra*.

[36]*See, e.g.*, Joint Statement of Ellmore C. Patterson, Chairman of the Board, Morgan Guaranty Trust Co. of New York, David Rockefeller, Chairman of the Board, The Chase Manhattan Bank N.A., Walter B. Wriston, Chairman of the Board, First National City Bank, Hearings on S. 1833, S. 1862, S. 2372, S. 2514 and S. 2523 before the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess., at 650 (1975).

operating expenses still more could force Cities into short term borrowing that the money markets can now ill support, and that might begin the rollover process that so severely damaged New York City.

"Short term debt has been the cause of nearly every credit collapse in recent times," Brenton W. Harries, President, Standard & Poors Corp., Speech before National League of Cities, December 1975. Its occurrence can easily lead to those symptoms common to Cities "on the brink of Financial trouble." *See*, Advisory Commission on Intergovernmental Relations, *City Financial Emergencies: The Intergovernmental Dimension* (1973).

Even if Cities do not borrow, the choices forced upon officials mean less government per tax dollar, no matter what course they pursue. The options are to either raise taxes or reduce services.

The urban exodus of persons and industry into surrounding suburbs has placed a severe strain upon the Cities, lowering their tax bases while leaving a large population of poor persons demanding expensive services behind.[37]

The other side of the urban exodus is the suburban influx requiring suburban communities to provide expensive government facilities and services to waves of new citizens. The budgetary problems occasioned by this surge of population are attested to in decisions

[37]Congressional Budget Office, New York City's Fiscal Problem: Its Origins, Potential Repercussions, and Some Alternative Policy Responses, Senate Hearings *supra* 509, 525; Statement of Moon Landrieu, Mayor of New Orleans, La., Senate Hearings *supra* at 554; Statement of Mayor Landrieu, Hearings before the Subcommittee on Economic Stabilization of the House Committee on Banking, Currency and Housing, 94th Cong., 1st Sess., at 1479-80 (Oct. 1975).

involving growth control. See, e.g., *Oakwood at Madison, Inc. v. Township of Madison*, 117 N.J. Super. 11, 283 A.2d 353 (1971); *Golden v. Planning Board*, 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291, *appeal dismissed*, 409 U.S. 1003 (1972).

The 1974 Amendments would not only increase State and local deficits. They would add further burdens to all those Cities now facing, in addition to the problem of decay and exodus, or of influx and need for intensive development of new services, the severe strains placed upon them by a less-than-healthy economy.

IV.

FEDERAL CABINET AND SIMILAR OFFICIALS HAVE, SINCE THE FIRST ARGUMENT IN THIS CASE, DECRIED EVEN LESS DEBILITATING FEDERAL INTRUSIONS INTO STATE AND CITY POLICY-MAKING.

Appellants here add to the previously quoted oppositions to the Act of two Secretaries of Labor (Appellants' Brief at 19-21) and one Presidential veto (Appellants' Brief at 24-25) the following statements by Federal officials in complaint of Federal intrusions into State and City policymaking.

In argument (April 16, 1975) in this case, the Solicitor General admitted:

> " . . . Congress does not have the same freedom under the commerce power to regulate activities of States and cities as it does those of private businesses." Tr. 38-39.

A similar attitude toward the unique role of State and local Governments has been expressed numerous times by members of the Federal Executive branch of Government. For example, Attorney General Levi has stated:

> "The issue [of constitutional Federalism] is whether it is permissible or appropriate for the Congress to intrude upon such State sovereignty as is left by requiring State agencies and employees to perform as though they were Federal instruments or employees, or as though the Federal Congress were the State legislature and possessor of the State's sovereignty." Testimony before the Senate Commerce Committee concerning S. 354, June 5, 1975.

Former NLRB Chairman Edward E. Miller expressed a similar view to the House Labor Subcommittee on the subject of national pre-emptive collective bargaining legislation for State and local Government employees:

> "[S]tate laws and the agencies administering those laws have, in many instances, developed different views with respect to bargaining units than those applied by the NLRB in the private sector. . . . [I]f all of this experimentation, legislation, and administration tailored to the need of the specific states is to be discarded through pre-emption and no cession whatever, in favor of traditional private sector standards as to appropriateness of units, it would in my view constitute a draconian measure which would unwarrantedly ride roughshod over the needs and desires – and the experience – of many states." G.E.R.R. (No. 611) at B-9.

The present NLRB Chairman Betty Southard Murphy, in a letter to the same subcommittee indicated that the issues presented by national pre-emptive collective bargaining legislation are similar to and

related to the 1974 Fair Labor Standards Act Amendments:

> "As you are undoubtedly aware, however, the enactment of such a change [amendment of NLRA to include State and local Governments] may present a constitutional issue inasmuch as the United States Supreme Court recently heard oral argument on April 16, 1975, on whether the amendments to the Fair Labor Standards Act . . . were constitutional." G.E.R.R. (No. 610) at B-2.

In like manner, members of the Executive branch have recognized the importance of State and local fiscal autonomy. As Secretary of the Treasury William E. Simon stated:

> "Federal control of fiscal and financial affairs at the local level presents grave practical and philosophical difficulties. This is not a dispute between liberals and conservatives, but rather simply a question of the right of citizens to be governed by their duly elected local leaders rather than by Federal bureaucrats.
>
> * * *
>
> "Each political subdivision in this nation has unique needs. And each is led by people selected for the job by an electorate which believed that such people could best translate the needs of the community into effective governmental decisions. Yet any program of financial assistance would require bureaucrats in Washington to supervise these decisions and reverse them if necessary, irrespective of the wishes of the local electorate. It is one thing to regulate a corporation. Under our democratic system, it is quite another to supervise and control the affairs of local governments." House Hearings, *supra*, at 1853, 1857.

V.

AT THE SAME TIME, THE CONGRESS AND APPELLEE HERE HAVE CONSIDERED EVEN MORE DEBILITATING LABOR ACT PROVISIONS FOR STATE AND CITY GOVERNMENT.

Two examples of the invasion which this Federal presence would make on State and local autonomy are presented by H.R. 10130, 94th Cong. 1st Sess. (1975), and the recently effective amendments to 29 CFR § 541. H.R. 10130 would further amend the Fair Labor Standards Act, increasing the minimum wage to $3.00 per hour, paying overtime at a rate of two and one-half times regular pay and automatically tying future pay hikes to rises in the consumer price index. The passage of this bill into law would require the immediate enactment of additional State and local appropriations irrespective of the availability of funds[38] and without the exercise of one State or local ballot.[39]

The recent amendments to 29 CFR § 541, 40 Fed. Reg. 7091 (Feb. 19, 1975), raise wage requirements

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[38]Even the imminency of bankruptcy is no defense to liability under the Act. See Annotation, 24 ALR Fed. 920 (1975) and cases cited therein.

[39]Where there is local control, Governments may bargain with employees to reach settlements amicable to both. For example, in a recent wage settlement with the Wisconsin State Employees Union, the inability of the State to meet all Union wage increase demands led to great Union strides in non-economic issues such as full time Union stewards, strengthened seniority provisions and additional holidays. G.E.R.R. (No. 625) at B-17 (Sept. 29, 1975). No minimum requirement of the Fair Labor Standards Act may be altered by agreement between employer and employee.

needed to partially exempt personnel as either executive, professional or administrative. The result is either broader coverage under the Act, resulting in additional overtime expenses for heretofore partially exempt personnel, or the need of an automatic raise to these professional, executive and administrative personnel in order to maintain their partial exemptions.

This is a policy decision of the Labor Department mandated without the consideration of one elected official and without the approval of one constituent. Any State or local Government who did not "rubber stamp" this Federal mandate by acquiescent budget appropriation would be subject to class actions, become liable under the Act for judgments, including costs, and attorneys' fees and criminal penalties.

SUMMARY OF ARGUMENT

On the same day this case was set over for reargument, this Court established the parameters of the test to be applied to the facts of this case. *Fry v. United States*, 421 U.S. 542.

As in *Fry*, the outcome of this case depends on a balancing of the existence of any compelling national need for national legislation, and the adverse impact on States and Cities of that national legislation.

The Appellee here is caught in the dilemma of at once trying to show that the Labor Act will produce almost no change in States' and Cities' personnel spending and in their policies, while trying to show that the Labor Act was enacted under Congress' perception that great changes were needed to upgrade substandard personnel conditions among State and City Government employees.

This problem was not presented to the national legislation's defenders in *Fry;* there the national Act saved money for the States, and was disruptive only the way the Bankruptcy Act is disruptive of those who would be generous before just.

From the time of the argument of this case (April 16, 1975) to the time of the filing of this Supplemental Brief, States and Cities have reported their further assessment of the tremendous damage the 1974 Labor Act Amendments will impose on them. Even now Cities are not able to assess the full impact on their budgets and on the integrity of their State law systems, of having City budget decisions made by Federal Courts under a statute which provides for damages which with liquidated damages can equal triple-time (especially in the often-used compensatory-time situation), costs, attorneys fees, criminal penalties and employee class actions. The Stay issued December 31, 1974, 419 U.S. 1321, has prevented *pendente lite* such a massive intrusion (by all but the most obtuse and obdurate of the Appellee's enforcement officers who presently seek to enforce the Act as applied to all State and City employees except police and firefighters). During the same time, Federal cabinet officers have admitted the problem of Federal interference in State and City Government decisionmaking.

Each of these considerations makes more imperative the preservation of our 200 year old Federal system by declaring unconstitutional the 1974 Amendments to the Labor Act.

In *Fry*, this Court declared that the Tenth Amendment:

"expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." 421 U.S. at 547 n. 7.

While in *Fry*, the balancing of the interference to the Federal anti-inflationary scheme of the State of Ohio's decision to spend money in an amount twice the Federal plan, dictated the upholding of the Federal (Economic Stabilization) Act; in this case, the Federal scheme requires States and Cities to pay money for unnecessary overtime and requires the duplication of employee personnel and Court administration, thus promoting inflation. The congressional basis for bringing all of State and City Governments within the Labor Act was not subminimum wages: the Congress admitted that less than 1% of the employees of these Governments to be included under the Act were paid less than the proposed Federal minimum wage and never identified even these. Congress made no showing that these 1% have struck over wages under the Federal standard. The effect of these 1974 Labor Act Amendments, as reported by States and Cities since April 1975, has been in overtime required by the Act. Because of higher recruitment,[40] training and pension costs,[41] the para-

[40]One of the greatest concerns of States and Cities in recruitment of employees is the Federal standards of the 1972 Amendments to Title VII of the Civil Rights Act of 1964; unlike the 1974 Labor Act Amendments which are based only on the Commerce Clause, these 1972 Civil Rights Amendments are grounded on the Fourteenth Amendment.

[41]The Congress is presently conducting hearings (H.R. 9155, 94th Cong., 2d Sess.) to determine whether coverage of all State and City pension plans is permissible under the Commerce Clause.

doxical effect of the Labor Act has not been to spread government employment, but to increase the cost to taxpayers of government employees and, because of State and local law limits on increasing these employee costs, to reduce government employment and government services.

Thus the Labor Act interferes with State and City Government decision-making in the same expressly unconstitutional manner as that at which Attorney General Levi, Secretary Dunlop, formerly the Appellee here, Chairman Burns, Secretary Simon and President Ford have recently expressed abhorrence.

ARGUMENT

I.

UNDER THE COMMERCE CLAUSE TEST OF *FRY*, THE ADMISSIONS OF THE APPELLEE HERE SHOW NO SUFFICIENT COMMERCE EFFECT OF STATE AND CITY WAGE-PAYING TO JUSTIFY THEIR REGULATION UNDER THE LABOR ACT.

In *Fry v. United States*, 421 U.S. 542, decided the same day as reargument was ordered in this case, the nexus to commerce cited by the Court was the potential of States to grant wage increases in excess of the national Government's scheme.[42] And this was the very State activity which the national scheme upheld in *Fry* addressed. *Fry's* citation to *Maryland v. Wirtz*, 392

[42]"[G]eneral raises to State employees could inject millions of dollars of purchasing power into the economy and might exert pressure on other segments of the work force to demand comparable increases." 421 U.S. at 547.

U.S. 183, is limited by the facts of *Fry*, as this Court said, 421 U.S. at 548.

In this case, there is no correspondence between the State and City activity cited as affecting commerce and the activity regulated by the Labor Act. By his reliance entirely on State and City activities *other* than the payment of subminimum wages – the target of the Labor Act – to support that Act, the Appellee here follows the Congress in admitting that the Labor Act as applied to States and Cities bears no proper or rational relation to the Commerce Clause power of Congress.

The Appellee admits States and Cities do not pay below the minimum wage fixed by Congress. Although in his Brief at 16 n. 13, the Appellee tries to include as justification for the 1974 Amendments some State and City employees previously covered, he admits there that Congress could cite only 95,000 (out of 11,400,000) State and City employees paid under the 1974 Amendments' minimum.

We await the Appellee's identification of even these 95,000. None of the States and Cities named as Appellants pay subminimum wages; and we candidly doubt that the 95,000 exist as the Appellee claims.[43]

For these few employees, the nexus to commerce claimed by the Appellee is that their strikes burden the flow of goods across State lines.[44] Br. at 13, citing *Maryland v. Wirtz*, 392 U.S. at 195. Yet the Appellee's own document, *Work Stoppages in Government 1972*[45]

[43]Cape Girardeau, Missouri (Complaint ¶13-14; App. 15) pays over the Labor Act's minimum for hours actually worked by its firemen.

[44]The Appellee also argued, Br. 25, that raising wages to the Labor Act's standard would reduce welfare claims.

[45]Cited in the Brief of Senators Williams and Javits as *Amici Curiae* at 10 n. 15.

shows that few strikes by State and City employees were over wages under the Labor Act's standards.

With no creditable evidence of State and City strikes over wages below the Labor Act's standard, the Appellee turned to other activities of States and Cities – none of which is the object of the Labor Act – as the "nexus to commerce": that States and Cities *purchase* goods produced in other States (there was no contention that States or Cities *sell* goods interstate),[46] including containers, furniture and printing (Br. 13-15); that these purchases generate jobs in the private sector (Br. 23); that States and Cities operate airports and other facilities which compete with private facilities (Br. 20); and that States and Cities compete with each other for investment and population (Br. 21).[47] None of these grounds will pass the *Fry* test of a nexus to commerce, because they are not the wage-paying activity which is regulated in States and Cities by the Labor Act and none have been shown to have been curtailed by strikes over subminimum wages of Government employees.

Mr. Justice Cardozo, dissenting in *Carter v. Carter Coal Co.*, 298 U.S. 238, 328, said: "The [commerce] power is as broad as the *need* that evokes it." (emphasis added).

The necessary corollary is that Congress must demonstrate[48] the need for commerce power legislation.

[46]A recent Florida Federal Court case found municipal sanitation workers do not have even the nexus to commerce required by the Act since they are the "ultimate consumers" of the trucks and gasoline they use. *Brennan v. Industrial America Corp.*, 371 F. Supp. 1164 (M.D. Fla. 1974).

[47]Citation to *United States v. Darby*, 312 U.S. 100, cannot support this ground since Darby Lumber sold and shipped interstate, the lumber produced with substandard wages.

[48]This demonstration must be specific where the Federal-State balance is altered. *United States v. Bass*, 404 U.S. 336, 349.

Congress cannot rest on a showing that States and Cities are involved in interstate commerce, or on the Appellee's showing here, e.g.:

> "Finally, as large scale employers, public agencies are implicated in all of the other Congressional policies underlying the 1974 Amendments, including the stimulation of the economy by additional consumer spending, the creation of new jobs by spreading employment and the reform of the welfare system." Br. 11.

Rather, the Congress must demonstrate that specific State and City employees are subject to a condition which the Labor Act corrects or improves; Congress further must demonstrate that this *labor condition* affects interstate commerce (not merely that States and Cities by purchasing goods affect interstate commerce). And Congress must demonstrate these two connections substantially rather than minimally.[49]

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[49] In *Carter*, Mr. Justice Cardozo also said:

> "The underlying thought is merely this, that 'the law is not indifferent to considerations of degree.' A.L.A. Schechter Poultry Corp. v. United States, supra, concurring opinion, p. 554. It cannot be indifferent to them without an expansion of the commerce clause that would absorb or imperil the reserved powers of the states. At times, as in the case cited, the waves of causation will have radiated so far that their undulatory motion, if discernible at all, will be too faint or obscure, too broken by cross-currents, to be heeded by the law. In such circumstances the holding is *not directed* at prices or wages considered *in the abstract, but at prices or wages in particular conditions.* The relation may be tenuous or the opposite according to the facts. Always the setting of the facts is to be viewed if one would know the closeness of the tie." *Id.* at 327-328 (emphasis added).

In this case, neither the Congress nor the Appellee has identified any of the 95,000 State and City employees whose receipt of wages less than the Labor Act's standard is claimed as justification for the Act's 1974 Amendments. Nor has the Congress or the Appellee shown that any of these 95,000 "ghosts" has ever gone on strike. Nor has the Appellee shown that such strikes, if any, were over wages below the national standard or that any such strikes so shut down a City as to curtail its purchases.

II.

IF THE APPELLEE IS CORRECT THAT THE 1974 LABOR ACT AMENDMENTS HAVE LITTLE EFFECT ON CITIES, APPELLANTS ARE CORRECT THAT THERE IS NO RATIONAL NEED OR RELATION OF THESE AMENDMENTS TO COMMERCE.

The Court in *Fry* reasoned that, even if a nexus to commerce were shown, interference with governmental functions of State and Cities might be sufficiently great to invalidate Federal legislation. 421 U.S. 547n.7.

The Congress and the Appellee here must also demonstrate that the Labor Act's amelioration (of a commerce-crippling labor condition among States and Cities) itself does not cripple States and Cities. To rebut the possibility that the cure is worse (under Federalism) than the (Commerce) disease, they must show not only a *large* impact of these 95,000 "ghosts' " strikes over low wages – none of the three elements of which have they

shown; they also must show a *small* dislocation of the wage-raising Labor Act on States and Cities.[50]

This Court is asked to uphold the 1974 Amendments because of the Appellee's claim that they do not affect States and Cities greatly. Appellants ask: why, then, were they needed in the first place?

Fry did not present this problem, since the Federal scheme there upheld *prevented* States and Cities from spending in an inflationary and damaging manner. Such restraint on spending is precisely the interest of States and Cities here. It must be if they are to retain their fiscal integrity.

CONCLUSION

The 1974 Labor Act Amendments cannot be upheld under the standard of *Fry v. United States.* The Congress and the Appellee here have not identified any State or City employees receiving wages below the Labor Act's standard. Of the 95,000 unidentified "ghosts" Appellee claims to be so paid, neither the Congress nor the Appellee has shown any to have struck their Government employers over these wages. Such a showing of need for the Labor Act by States

[50]The Appellee attempts to do this by showing revenue sharing payments to States and Cities. (Br. 44-45). The Appellee can hardly assert that revenue sharing is the national Government's paying for its regulation of States' and Cities' budgets, since the Federal taxes, which form the fund from which revenue sharing payments are made, inhibit the use of State and City taxes which otherwise could be applied to offset the Labor Act's tremendous cost.

and Cities, such a nexus to interstate commerce, is required under *Fry*.

In any case, the over $1,000,000,000.00 cost of these Amendments (Appendix hereto) so harms States and Cities, so dictates State and City policy as a practical matter, that these Amendments cannot be squared with the Federalism principles enunciated in *Fry*, 421 U.S. 547 n. 7, and *Maryland v. Wirtz*, 392 U.S. 183, 196 and n. 27.

The decision of the District Court below should be reversed with directions to grant the declaratory and permanent injunctive relief prayed for in the Complaint.

Respectfully submitted,

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APPENDIX

International City
Management Association
Washington, D.C.

February 20, 1976

Charles Rhyne, Esq.
Rhyne & Rhyne
839 17th Street, N.W.
Washington, D.C.

Dear Mr. Rhyne:

The director of the ICMA Urban Data Services (which collects more data about local government than any other organization with the exception of the U.S. Bureau of the Census) has at my request reevaluated the financial implications of the 1974 amendments to the Fair Labor Standards Act. It is almost impossible to accurately forecast the total cost for all of state and local government. However, based on our survey data, we expect the cost to cities over 10,000 population for police and fire only to approximate $792 million. We can with some confidence therefore state that for all cities it will impose additional costs in excess of one billion dollars per year to meet the full requirements of the Act for all employees. This includes only the personnel costs and does not include the significant indirect costs involved in court actions, fire insurance, and other hidden and indirect costs.

Sincerely yours,
/s/ Mark E. Keane

Mark E. Keane
Executive Director

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-878

THE NATIONAL LEAGUE OF CITIES, ET AL., APPELLANTS

v.

W. J. USERY, Jr., SECRETARY OF LABOR

No. 74-879

THE STATE OF CALIFORNIA, APPELLANT

v.

W. J. USERY, Jr., SECRETARY OF LABOR

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE APPELLEE ON REARGUMENT

We are filing this supplemental brief on reargument to amplify two points made in our original brief: (1) that the 1974 Amendments to the Fair Labor Standards Act should not be invalidated because of concern that, if this application of the commerce power to state employees is upheld, the way is open to sweeping federal interference with state

sovereignty; and (2) that the impact of the 1974 Amendments upon the states is not nearly as great as the states suggest. We also argue that this Court's recent decision in *Fry* v. *United States,* 421 U.S. 542, supports the constitutionality of the 1974 Amendments.

1. a. The two dissenters in *Maryland* v. *Wirtz,* 392 U.S. 183, were of the opinion that if the commerce power could be extended to reach "employees of state-owned enterprises" (*id.* at 201), the consequences would be to "disrupt the fiscal policy of the States and threaten their autonomy in the regulation of health and education" and to "overwhelm state fiscal policy" (*id.* at 203). They questioned whether "[i]f constitutional principles of federalism raise no limits to the commerce power where regulation of state activities are concerned, could Congress compel the States to build superhighways crisscrossing their territory in order to accommodate interstate vehicles, to provide inns and eating places for interstate travelers, to quadruple their police forces in order to prevent commerce-crippling riots, etc.? Could the Congress virtually draw up each State's budget to avoid 'disruptive effect[s] * * * on commercial intercourse.' ?" (*id.* at 204–205), and concluded that

> [i]f all this can be done, then the National Government could devour the essentials of state sovereignty though that sovereignty is attested by the Tenth Amendment. [*Id.* at 205.]

The same kind of argument, based upon the fear of a possible unlimited extension of federal authority into the areas theretofore considered the exclusive

province of the states, could also have been made in the many cases in which this Court has upheld federal legislation under the commerce power that reaches into or preempts a subject which, were it not for such legislation, would be a matter for state control. Indeed, as we show below, the federal statutes involved in those cases created a more significant "interfere[nce] with sovereign state functions" than the application to state and local government employees of the Fair Labor Standards Act requirements involved in this case. In none of those cases, however, did the Court invalidate the application to the state of the exercise of the commerce power because of the theoretical possibility that, if such exercise were sustained, it could lead to federal usurpation of the states' traditional exercise of their police powers.

Yet that argument could have been made in each of those cases, for if the commerce power may apply to or oust state regulation in significant aspects of such areas as labor relations, safety and health standards, commercial requirements and the many other subjects which have been held governed or preempted by federal law, there would be no logical reason why the federal government itself could not set all the standards to be followed in those areas. Many years ago, Mr. Justice Holmes, speaking for the Court in *Noble State Bank* v. *Haskell,* 219 U.S. 104, 110, warned against "pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or an-

other of the great guarantees in the Bill of Rights." Mr. Justice Cardozo expressed the same thought when he referred to "[t]he tendency of a principle to expand itself to the limit of its logic" (Cardozo, *The Nature of the Judicial Process*, p. 51 (1921)).

b. This Court has upheld various federal statutes, enacted in the exercise of the commerce power, that reach into local areas that traditionally have been viewed as the province of the states or preempt the states from exercising their traditional regulatory authority. In those cases, because the states' policy choices affecting the people they govern would no longer prevail, the "interference" with state sovereignty resulting from the application of the federal statutes was far more penetrating than the relatively mild impact of the requirements in the 1974 Amendments that the states apply the same minimum labor standards for their employees that most private employers provide (which does not displace any particular state choice of government policy). It is the former category of cases, not the latter, that directly affects the *raison d'être* of state governmental institutions.

For example, 60 years ago the Court upheld federal regulation of intrastate rail rates which was designed to eliminate discrimination against interstate commerce. *Houston, E. & W. Texas Ry. Co.* v. *United States*, 234 U.S. 342. In *Wickard* v. *Filburn*, 317 U.S. 111, the Court sustained the application of the commerce power to regulate the production of grain by an individual farmer that was intended

wholly for consumption on the farm. Cf. *United States* v. *Darby*, 312 U.S. 100; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1. More recently, in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, and *Katzenbach* v. *McClung*, 379 U.S. 294, the Court held that the commerce power extends to the regulation of such traditionally local matters as the operations of a motel and a restaurant.

The states cannot exercise their traditional authority in the labor field to regulate picketing and other aspects of labor-management relations if the conduct sought to be regulated is arguably subject to the National Labor Relations Act. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236; *Garner* v. *Teamsters, Chauffeurs and Helpers Local Union No. 776*, 346 U.S. 485; *Amalgamated Association of Street, Etc., Employees* v. *Wisconsin Employment Relations Board*, 340 U.S. 383. In another "field which the States have traditionally occupied"—the regulation of grain warehouses—the United States Warehouse Act ousts the states of their regulatory authority. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230. Similarly, the Federal Tobacco Inspection Act was held to preempt a Georgia statute requiring that a particular type of tobacco be identified. *Campbell* v. *Hussey*, 368 U.S. 297.

A state's authority to require aliens within its borders to register was invalidated as conflicting with the federal regulatory scheme for aliens. *Hines* v. *Davidowitz*, 312 U.S. 52. Although "[c]ontrol of noise

is of course deep-seated in the police power of States," an attempt by a city to place a nighttime curfew on jet flights from its airport was invalidated because the subject matter was preempted by the Federal Aviation Act. *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638.

The foregoing cases are, of course, merely illustrative and not exhaustive. Many more could be cited. The point is simply that a valid exercise of the commerce power is not to be rejected merely because it subjects to federal standards areas that the states traditionally have controlled. The principle fully applies to this case.

2. a. Appellants assert that compliance with the 1974 Amendments would impose "enormous costs" which would "destroy the fiscal integrity" and "entire fiscal foundation" of the state and local governments (N.L. Br., pp. 33, 37; Cal. Br., p. 8).[1] Appellants estimate, for example, that the Amendments will cost California $34.5 million annually, of which $23.6 million would relate to fire protection activities (Cal. Br., p. 14, n. 10), and that the nationwide cost increase for fire protection activities will be $200 million (N.L. Br., pp. 10–11). These estimates, as detailed in our original brief (pp. 44–53), are largely

[1] Although the fiscal burden imposed on states by congressional action under the commerce power typically raises only "questions of policy" and not constitutional issues (see our original brief, pp. 45–46), we assume that a federal statute would be unconstitutional if the fiscal burden it imposed was so substantial that it obliterated federalism and state sovereignty. See our original brief, pp. 40–41.

unsupported by any underlying facts[2] and are based largely on a misconception of the Act's requirements.

In any event, the additional costs of complying with the Amendments that appellants project, when considered in light of the total expenses of state and local governments (approximately $236 billion)[3], would not, as appellants fear, "destroy the [States'] * * * entire fiscal foundation." The alleged additional costs for fire protection activities of $200 million, for example, would be less than one percent of the state and local governments' total expenditures. Although the additional costs may require state and local governments to curtail certain activities or to raise additional

[2] The difficulty in assessing the accuracy of appellants' cost figures is illustrated by California's estimate of the cost impact of the Amendments on its Ecology Corps. According to California, this would be $1 million and, as a result, California has reduced its Ecology Corps centers from eight to five (Cal. Br., pp. 18–19). The $1 million cost estimate is based on the stated assumption that Corps employees are paid 75 cents an hour, which is incorrect since they are paid differing rates depending on their work assignment, ranging up to $2.80 per hour for firefighting activities (*Review of the California Ecology Corps*, Committee on Efficiency and Cost Control of the California Assembly, 1972, pp. 10–13). That estimate further assumes that no credit can be taken for the cost of room and board (which, as indicated in our original brief, p. 48, is not correct). Moreover, an entry in the *1975–76 Governor's Budget Summary* indicates that three Ecology Corps centers will be converted "to provide facilities for a greater number of inmates from the State Department of Corrections" (*Summary*, p. A–24)—which suggests a reason other than the 1974 Amendments for the loss of the three centers.

[3] Executive Office of the President, Office of Management and Budget, *Special Analyses, Budget of the United States Government*, pp. 203, 205 (Washington, D.C. 1974).

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revenue,[4] those costs would constitute only a small part of the total expenses of those activities. In any event, similar pressures on existing service levels will arise from the general increases in labor costs mandated by collective bargaining agreements or legislative enactments, higher interest rates payable on the public debt, and the recent overall rise in the cost of government.

Moreover, the additional costs imposed by the 1974 Amendments would constitute only a small percentage of the amounts that state and local governments receive in the form of federal grants. Thus, the significance to California of its estimated $34.5 million in additional costs under the 1974 Amendments must be evaluated in light of the fact that California receives 173 times that amount—or $6 billion—in federal subsidies.[5] The total federal contribution to the budgets of state and local governments in fiscal year 1974 was approximately $52 billion.[6] These federal payments include substantial amounts for law enforcement and firefighting activities, which are available, *inter alia,* for training expenses and the payment of salaries. See, *e.g.,* the State and Local Fiscal Assistance Act of 1972, 86 Stat. 919, 31 U.S.C. (Supp. IV)

[4] This was also true of the costs imposed by the 1966 Amendments which were upheld in *Maryland* v. *Wirtz, supra.*

[5] *1975–76 Governor's Budget Summary,* Schedule 6, pp. B–23 to B–26.

[6] *Special Analyses, Budget of the United States Government, supra,* n. 3, at p. 203.

1221 *et seq.;*[7] the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, as amended, 42 U.S.C. 3701 *et seq.;*[8] and the Intergovernmental Personnel Act of 1970, 84 Stat. 1909, as amended, 42 U.S.C. 4701 *et seq.*[9]

Therefore, the cost impact of the 1974 Amendments (which, in absolute terms, is relatively small) would not even remotely impair the effective functioning of the state and local governments.

b. Contrary to appellants' contention (N.L. Br., p. 41), the 1974 Amendments do not "regulate the most intimate, internal and essential governmental function of States and local Governments [by] prescribing terms and conditions of employment of the employees of those Governments" or "usurp" control over a broad range of state and local government policy decisions. The Amendments—in order to accomplish the congressional objectives of maintaining minimum living conditions and of "effect[ing] greater employment by providing a financial disincentive to employers who require overtime hours" (*Dunlop* v. *State of New Jersey,* 522 F. 2d 504, 507 (C.A. 3), petition for writ of certiorari filed October 6, 1975, No. 75–532)—place only minimal restrictions on the authority of state and

[7] See Office of Revenue Sharing, U.S. Department of the Treasury, *Payment Summary* 6 (1975).

[8] See Office of Economic Opportunity, the Executive Office of the President, *Fiscal Year 1974 Federal Outlays in Summary.*

[9] See U.S. Civil Service Commission, Bureau of Intergovernmental Personnel Programs, *Grant Awards for Fiscal Year 1974.*

local governments to set the terms and conditions of employment of their own employees. The Amendments require those governments to pay a living wage; bar them from sex-based wage discrimination, age discrimination and the employment of children in hazardous occupations; and require that covered employees be paid a higher rate for overtime hours, which payment must be in cash and not in compensatory time unless taken within the same pay period (*see Dunlop* v. *State of New Jersey, supra*).

The regulations which the Secretary has issued under the Amendments as 29 C.F.R. Part 553 do not impose any substantive requirements on state and local governments.[10] They do not, as appellants assert, require firefighters to work in four 12-hour shifts (Cal. Br., p. 12) or otherwise establish their hours of work, or their sleep and meal times. They do not prohibit the joint employment by state and local governments of the same individuals or the use of volunteers. They do not require that certain benefits (such as fire mission pay) be denied to employees who do not qualify for the partial overtime exemption applicable to those engaged in fire protection and law enforcement activities. They do not compel state and local

[10] These regulations do make some minor adjustments in the Act's recordkeeping requirements for those state and local government agencies who take advantage of the partial overtime exemption for employees engaged in fire protection and law enforcement activities. Under the regulations, the records for such employees must be kept on a "work period" basis and must show the work period for each employee. 29 C.F.R. 553.21. The remaining sections of the regulations are simply the Secretary's interpretations of the 1974 Amendments. See *infra*, p. 11.

governments to pay for training time (unless it is required as part of the employees' hours of work, in which event the employees must be paid at least the statutory minima). They do not prohibit police and fire training or "mutual aid" agreements (Cal. Br., pp. 12–14, 19; N.L. Br., pp. 34, 49, 82, 84–85, 120). For a more detailed discussion of this point, see our original brief, pp. 47–53.

The only purpose of these interpretive regulations is to inform public agencies of their obligations under the Act and of their options for minimizing their monetary outlays, such as by adjusting the work schedules of their employees so as to take advantage of the Act's partial overtime exemption for employees engaged in fire protection and law enforcement activities. 29 U.S.C. (Supp. IV) 207(k). The regulations also inform the public agencies about the circumstances under which waiting time, training, joint employment and mutual aid will be treated as hours of work and thus may require overtime premium pay. The Act does not prohibit state and local governments from requiring their employees to work in excess of the hourly limits; it simply requires premium pay if they do. The state or local government may avoid such higher pay by hiring additional employees.[11]

3. In *Fry* v. *United States*, 421 U.S. 542, the Court last Term upheld the constitutionality of the application to state employees of the limitations on wage and

[11] Among the activities which appellants contend will require considerable overtime (N.L. Br., p. 86) are some that could easily be taught to new employees, such as snow removal.

salary increases imposed by the Economic Stabilization Act of 1970, against similar challenges based on the Commerce Clause and the Tenth Amendment. The Court held that the case was controlled by *Maryland* v. *Wirtz*, *supra* (*id.* at 548). Although distinctions may be drawn between the reach of the statutory provisions involved in *Fry* and those in the present case (cf. *ibid.*), the basic rationale of *Fry* supports the constitutionality of the 1974 Fair Labor Standards Amendments.

The main argument in *Fry* was that "applying the Economic Stabilization Act to state employees interferes with sovereign state functions and for that reason the Commerce Clause should not be read to permit regulation of all state and local governmental employees" (*id.* at 547; footnote omitted). The Court held that the argument was "foreclosed" by *Maryland* v. *Wirtz* "where we held that the Fair Labor Standards Act could constitutionally be applied to schools and hospitals run by a State" (*id.* at 548). It noted that the attack on the statute was framed "in terms of the limitations on [the commerce] power imposed by the Tenth Amendment," which "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system" and concluded that "the wage restriction regulations constituted no such drastic invasion of state sovereignty" (*id.* at 547–548, n. 7).

The 1974 legislation similarly neither "interferes with sovereign state functions" nor "impairs the

States' integrity or their ability to function effectively in a federal system." As we explained in our original brief (pp. 5–7, 42–43), the 1974 Amendments merely extended the minimum labor standards upheld in *Maryland* v. *Wirtz* (with the addition of the prohibition of age discrimination) to additional categories of state and local government employees. See, also, pp. 9–10, *supra*. Indeed, in one significant respect the coverage of these Amendments is substantially narrower than that of the statute upheld in *Fry*.

The limitations on wage and salary increases imposed by the Economic Stabilization Act of 1970 applied to virtually all state employees. *Fry* v. *United States*, *supra*, 421 U.S. at 546, n. 6. The 1974 Fair Labor Standards Amendments, however, merely extended the minimum wage and overtime requirements of that Act to an additional 30 percent of all state and local government employees (3.4 million out of 11.4 million). When this additional group of employees is combined with the 2.9 million of such employees who were covered by the statutory provisions upheld in *Maryland* v. *Wirtz*, they still constitute only 55 percent of the total state and local government employees (6.3 million out of 11.4 million).[13] Moreover, the Act's minimum wage and overtime requirements do not apply to executive, administrative and professional employees and, like the Act's other provisions, they do

[13] Of the 3.4 million employees added by the 1974 Amendments, only 95,000 were paid less than the minimum wage and were thus affected by this particular statutory requirement. See our original brief, pp. 16, 42–43.

not apply to elected state and local government officials or to individuals appointed by such officials to their personal staffs or to policy-making or legal advisory positions (29 U.S.C. (Supp. IV) 203(e)(2)(C), 213(a)(1), 630(b), (c) and (f)).

Indeed, the federal restrictions upheld in *Fry* and those involved in the present case are really opposite sides of the same coin. *Fry* involved the validity of limitations on the maximum wages and salaries the states could pay to their employees. The 1974 Amendments involve the minimum amounts the states may pay. Both cases involve federal limitations on a single aspect of state operations: the compensation of its employees through whom it formulates and carries out its policies. In neither case does the federal regulation control the substantive policies or operations of the state.

The Court noted in *Fry* that the Economic Stabilization Act was "an emergency measure to counter severe inflation that threatened the national economy" (421 U.S. at 548). That fact, however, merely explains why Congress believed it necessary to exercise its power under the Commerce Clause to stabilize wages and salaries; it does not explain why the legislation was within the scope of that clause. The holding in *Fry* that the Economic Stabilization Act was valid under the Commerce Clause and did not violate the Tenth Amendment rested not on the fact that the statute was emergency legislation, but on the fact that it did not constitute an impermissible interference by the federal government with state sovereignty.

As we pointed out in our original brief (pp. 12–13), the same reasoning that led the Court in *Maryland* v. *Wirtz* to uphold the constitutionality of the Fair Labor Standards Act as applied to employees of state schools and hospitals also supports the constitutionality of the same statute as applied to all state employees. In *Fry*, the Court held that the validity of the application of the Economic Stabilization Act to "all state and local governmental employees" was established by *Maryland* v. *Wirtz* (421 U.S. at 548). That decision, as thus interpreted and applied in *Fry*, also establishes the validity of the application of the Fair Labor Standards Act to all state and municipal government employees.

For the reasons set forth in our original brief and in this supplemental brief, the judgment of the district court should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-878

THE NATIONAL LEAGUE OF CITIES, ET AL.,
Appellants,

v.

JOHN T. DUNLOP, SECRETARY OF LABOR,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT, STATE OF MARYLAND

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BRIEF FOR APPELLANT, STATE OF MARYLAND

OPINION BELOW

The Order, Findings, and per curiam Opinion of the United States District Court for the District of Columbia, Civil Action No. 74-1812 (Dec. 31, 1974), are unreported. They may be found reprinted in the Appendix to the Brief for Appellants.

JURISDICTION

Because this is an appeal from a decision of a three-judge District Court, this Court's jurisdiction to entertain the appeal is predicated upon 28 U.S.C. § 1253.

QUESTIONS PRESENTED

The questions presented by this appeal are those stated and discussed in the Brief for Appellants. This Brief for Appellant, State of Maryland, does not present any additional questions.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent federal statutes and constitutional provisions bearing upon this case are set forth in the Brief for Appellants. The two sections of the Maryland Constitution which will be referred to in this Brief are:

Maryland Constitution, Article III, Section 32:

> No money shall be drawn from the Treasury of the State, by any order or resolution, nor except in accordance with an appropriation by Law; and every such Law shall distinctly specify the sum appropriated, and the object, to which it shall be applied . . . .

Maryland Constitution, Article III, Section 52:

> (1) The General Assembly shall not appropriate any money out of the Treasury except in accordance with the provisions of this section.
>
> (2) Every appropriation bill shall be either a Budget Bill, or a Supplementary Appropriation Bill, as hereinafter provided.
>
> (3) On the third Wednesday in January in each year, (except in the case of a newly elected Governor, and then not later than ten days after the convening of the General Assembly), unless such time shall be extended by the General Assembly, the Governor shall submit to the General Assembly a Budget for the next ensuing Each Budget shall contain a complete plan of proposed expenditures and estimated revenues for said fiscal year and shall show the

> estimated surplus or deficit of revenues at the end of the preceding fiscal year. Accompanying each Budget shall be a statement showing: (a) the revenues and expenditures for the preceding fiscal year; (b) the current assets, liabilities, reserves and surplus or deficit of the State; (c) the debts and funds of the State; (d) an estimate of the State's financial condition as of the beginning and end of the preceding fiscal year; (e) any explanation the Governor may desire to make as to the important features of the Budget and any suggestions as to methods for reduction or increase of the State's revenues.
>
> (4) Each Budget shall embrace an estimate of all appropriations in such form and detail as the Governor shall determine or as may be prescribed by law, as follows: (a) for the General Assembly as certified to the Governor in the manner hereinafter provided; (b) for the Executive Department; (c) for the Judiciary Department, as provided by law, certified by the Comptroller; (d) to pay and discharge the principal and interest of the debt of the State in conformity with Section 34 of Article 3 of the Constitution, and all laws enacted in pursuance thereof; (e) for the salaries payable by the State and under the Constitution and laws of the State; (f) for the establishment and maintenance throughout the State of a thorough and efficient system of public schools in conformity with Article 8 of the Constitution and with the laws of the State; (g) for such other purposes as are set forth in the Constitution or laws of the State.
>
> (5) The Governor shall deliver to the presiding officer of each House the Budget and a bill for all the proposed appropriations of the Budget classified and in such form and detail as he shall determine or as may be prescribed by law; and the presiding officer of each House shall promptly cause said bill to be introduced therein, and such bill shall be known as the "Budget Bill." The Governor may, with the consent of the General

Assembly, before final action thereon by the General Assembly, amend or supplement said Budget to correct an oversight, provide funds contingent on passage of pending legislation or, in case of an emergency, by delivering such an amendment or supplement to the presiding officers of both Houses; and such amendment or supplement shall thereby become a part of said Budget Bill as an addition to the items of said bill or as a modification of or a substitute for any item of said bill such amendment or supplement may affect.

(5a) The Budget and the Budget Bill as submitted by the Governor to the General Assembly shall have a figure for the total of all proposed appropriations and a figure for the total of all estimated revenues available to pay the appropriations, and the figure for total proposed appropriations shall not exceed the figure for total estimated revenues. Neither the Governor in submitting an amendment or supplement to the Budget Bill nor the General Assembly in amending the Budget Bill shall thereby cause the figure for total proposed appropriations to exceed the figure for total estimated revenues, including any revisions, and in the Budget Bill as enacted the figure for total extimated revenues always shall be equal to or exceed the figure for total appropriations.

(6) The General Assembly shall not amend the Budget Bill so as to affect either the obligations of the State under Section 34 of Article III of the Constitution, or the provisions made by the laws of the State for the establishment and maintenance of a system of public schools or the payment of any salaries required to be paid by the State of Maryland by the Constitution thereof; and the General Assembly may amend the bill by increasing or diminishing the items therein relating to the General Assembly, and by increasing or diminishing the items therein relating to the judiciary, but except as hereinbefore specified, may

not alter the said bill except to strike out or reduce items therein, provided, however, that the salary or compensation of any public officer shall not be decreased during his term of office; and such bill, when and as passed by both Houses, shall be a law immediately without further action by the Governor.

. . . .

(8) Supplementary Appropriation Bill. Either House may consider other appropriations but both houses shall not finally act upon such appropriations until after the Budget Bill has been finally acted upon by both Houses, and no such other appropriation shall be valid except in accordance with the provisions following: (a) Every such appropriation shall be embodied in a separate bill limited to some single work, object or purpose therein stated and called herein a Supplementary Appropriation Bill; (b) Each Supplementary Appropriation Bill shall provide the revenue necessary to pay the appropriation thereby made by a tax, direct or indirect, to be levied and collected as shall be directed in said bill; (c) No Supplementary Appropriation Bill shall become a law unless it be passed in each House by a vote of a majority of the whole number of the members elected; and the yeas and nays recorded on its final passage; (d) Each Supplementary Appropriation Bill shall be presented to the Governor of the State as provided in Section 17 of Article 2 of the Constitution and thereafter all the provisions of said section shall apply.

. . . .

STATEMENT OF THE CASE

The Appellant State of Maryland joins in the Statement which appears in the Brief for Appellants.

INTRODUCTORY STATEMENT

By submitting this Brief, the State of Maryland, one of the Appellants in this case, seeks to demonstrate some of the practical difficulties which an affirmance of the decision below would spawn. The specifics discussed herein pertain only to the State of Maryland, although the thrust of many of the arguments advanced might be applicable to her Sister State Appellants as well. By filing this supplementary Brief, Maryland does not in any manner withdraw her support from the arguments presented in the Brief for Appellants.

ARGUMENT

The District Court recognized in its opinion that "there is evidence that the impact of the 1974 [Fair Labor Standards Act (FLSA)] Amendments, in terms of confusing and complex regulations and an enormous fiscal burden on the states, is so extensive that it may seriously affect the structuring of state and municipal governmental activities by reducing flexibility to adapt to local and special circumstances . . . ." The relatively narrow purpose of this Brief is to demonstrate the validity of this observation *vis-á-vis* the State of Maryland, and to urge that its correctness is not solely of practical interest, but of constitutional import as well.

In 1916, upon the ratification of an amendment to the State Constitution, Maryland adopted an Executive Budget System. A true appreciation of this System can best be achieved by understanding the budget mechanism which the Executive Budget System replaced. The Court of Appeals of Maryland traced the pre-1916 budget system in *Panitz v. Comptroller of the Treasury*,

247 Md. 501, 505-06, 232 A.2d 891, 893-94 (1967), an opinion authored by Chief Judge Hammond.

> The situation in Maryland before the establishment of the executive budget system by amendment of the Constitution was well described by the late Hooper S. Miles, long Treasurer of Maryland, in his essay, The Maryland Executive Budget System. He said (pages 8 and 9):
>
> > 'It was customary, under the former method, for the Governor to appear in person before a joint meeting of the members of the House of Delegates and the Senate, at the beginning of every regular session of the Legislature, and to address them on "the condition of the State," — in the course of which he was expected to direct their attention to the essential needs of the State, and to specifically recommend to their consideration such measures as he judged necessary. Having thus discharged the responsibility imposed upon him by the Constitution, the Governor must thereafter await the final disposition of his recommendations by the Legislature, whose members were free to adopt, alter or entirely ignore any or all of them, except in so far as the Governor, by virtue of his prestige and his influence with the members of the Legislature, might affect the course of his recommendations through the Legislature.
> >
> > 'It is true, the Governor then had the "power to disapprove of any item or items of Bills making appropriations of money" and to thus void the items which he disapproved. However, his use of this veto power on individual items had to be exercised with rare discrimination and with an intimate understanding of the temper of the Legislature, to avoid the danger of antagonizing powerful groups in the Legislature, and thereby jeopardize all of his recommended measures. * * * *

'The power to fix the fiscal policies and determine the course of the fiscal operations of the State was, therefore, exclusively vested in the Legislature, subject only to the mild restraint of the limited veto powers of the Governor, and whatever power of persuasion he might be capable of exercising with individual members of the Legislature.

'The old method often witnessed "log-rolling" or "you help me and I'll help you" tactics among many of the members of the Legislature in their efforts to insure passage of the particular appropriations in which they had some selfish or political interest. It was not unusual for excessive appropriations to result from such tactics and also from the pressure of political and professional lobbyists; and, almost as frequently, some of the most important activities or needs of the State were either overlooked or sadly neglected in what was commonly termed, the "Pork Barrel" scramble.'

In 1916 this "old method" was significantly altered. "To correct the fiscal dilemma of the State and to prevent its recurrence the Legislature proposed and the voters approved a constitutional amendment which now is embodied in the Constitution as § 52 of Art. III," *Panitz v. Comptroller of the Treasury, supra,* 247 Md. at 507, 232 A.2d at 894. The single most important feature of this amendment is that it prohibits the General Assembly[1] from appropriating any funds except by way of an appropriation bill. Such an appropriation bill must either be a Budget Bill or a Supplementary Appropriation Bill, Md. Const. art. III, § 52(2), as those Bills are defined in Md. Const. art. III, §52(s), (8).

[1] "General Assembly" and "Legislature" are used interchangeably.

Section 52 may be summarized generally as follows: The Governor must prepare and submit to the Legislature a budget containing a complete plan of estimated income and proposed expenditures for the ensuing fiscal year, including specified mandatory appropriations such as those for the General Assembly, the judiciary and the servicing of the State debt. The Legislature cannot increase any of the appropriation items set out in the budget (other than those for the judiciary and the General Assembly) but it can strike out or reduce items therein other than those for the State debt, the judiciary, the provisions made by law for the establishment and maintenance of the public schools, and the payment of salaries required to be paid by the Constitution. After the Budget Bill has finally been acted upon by both houses, additional appropriations may be made by a majority of the Legislature provided:

> (a) 'Every such appropriation shall be embodied in a separate bill limited to some single work, object or purpose * * *.'
>
> (b) Each such appropriation bill 'shall provide the revenue necessary to pay the appropriation thereby made [by] a tax, direct or indirect, to be levied and collected as shall be directed in said bill.'
>
> (c) Each such bill is, however, subject to the right of the Governor to veto it, in accordance with the provisions of Section 17 of Article 2 of the Constitution.

Panitz v. Comptroller of the Treasury, supra, 247 Md. at 508, 232 A.2d at 894-95.

Maryland's Executive Budget System may be neatly summarized as follows:

> Section 52 of Article III provides for an executive budget plan whereby the Governor is required to submit a *complete plan* of proposed expenditures

> and estimated revenues (the budget), along with a bill for all proposed appropriations of the budget (the budget bill). The General Assembly cannot increase any of the items in the budget bill, other than those for the judiciary and the General Assembly,[2] but it can strike out or reduce items contained therein, except those for the state debt, for public schools, for payment of certain salaries, and for the judiciary.

Note, 28 Md. L. Rev. 395, 396 (1968) (footnote omitted). *See also* H.S. Miles, The Maryland Executive Budget System 10-12 (1942); Report of the Commission on Economy and Efficiency on a Budget System (Goodnow Commission Report), Maryland Senate Journal 129-34 (1916).

With respect to this case, the salient characteristic of the Executive Budget System is the imposition of the primary responsibility for controlling Maryland's fiscal policies and operations upon the Governor in such a manner that he is vested with almost total control over the extent of the total appropriations which the Legislature may make. *See generally* H.S. Miles, The Maryland Executive Budget System 10, 11 (1942). The Legislature may reduce items contained in the Governor's Budget Bill, but may not increase them, Md. Const. art. III, §52(6). This makes it impossible for the

[2] "Items proposed by the Governor in his Budget Bill may be reduced or eliminated by the legislature, but no new item may be introduced by amendment to the Budget Bill; only a Supplementary Budget Bill is permitted to be used for this purpose and it must provide a tax to raise the necessary revenue," McKeldin v. Steedman, 203 Md. 89, 98, 98 A.2d 561, 564 (1953). A third method of appropriating funds is provided for in Md. Const. art. III, §52(14). This is limited to use during special sessions of the General Assembly, which may be convened by the Governor, and are known as emergency appropriations. *See* Note, 28 Md. L. Rev. 395, 397 (1968).

Legislature to alter the Budget Bill so as to create a deficit. *See McKeldin v. Steedman*, 203 Md. 89, 97, 98 A. 2d 561, 564 (1953).[3] Neither may the Governor submit an unbalanced Budget or Budget Bill, nor may he amend them to produce a deficit budget. *See* Md. Const. art. III, §52(5a). Thus, with respect to the State's fiscal policies "Maryland is a 'strong Governor' State," *Hughes v. Maryland Committee for Fair Representation*, 241 Md. 471, 512, 217 A.2d 273, 297 (1966) (Barnes, J., dissenting).

The 1974 FLSA Amendments purport to dictate certain wages, hours, and other conditions of employment, for many more State and local government employees than did the 1966 FLSA Amendments sustained in *Maryland v. Wirtz*, 392 U.S. 183, 88 S. Ct. 2017 (1968). It is primarily to the wage setting and conditions of employment aspects of the 1974 FLSA putsch that this Brief is directed.

Employees of the State of Maryland are, of course, paid by the State. Provision for their compensation is made in the Governor's Budget and Budget Bill every year, which are reviewed during the annual legislative session. With the exception of certain salaries which the Constitution requires to be paid,[4] Md. Const. art. III, §52(6), the salaries paid to State employees may, and usually do, change each year. Furthermore, because the Maryland General Assembly is constitutionally con-

[3] The Legislature cannot precipitate a deficit in any fashion because if it enacts a Supplementary Appropriation Bill it must also enact a revenue raising measure to finance it. *See* Md. Const. art. III, §52(8).

[4] *E.g.*, Md. Const. art. II, §21 (prescription of Governor's salary).

strained to holding one annual 90-day session, Md. Const. art. III, §§14, 15(1), if the FLSA was amended by Congress at a time when the Legislature was not meeting, it would be impossible for Maryland to comply with such a revision until the next session convened. These yearly fluctuations, together with a seasonal Legislature, enhance the likelihood that any given Budget could provide less monies for salaries than the FLSA of 1938, as amended, call for, which, in turn, would lead to the enforcement of the Act against the State. Such enforcement proceedings would present many intriguing dilemmas.

Suppose that the Governor, by inadvertence or otherwise, did not allow for enough funds in his Budget Bill to pay State employees in accordance with the FLSA. Picture not a callous Governor, insensitive to the wants and desires of public employees. Rather, envision a conscientious Governor, faced with the difficulty of allocating a State's limited resources in such a manner as to satisfy a maximum number of his State's important, and almost unlimited, needs. The fact that financial means available to States and municipalities are not unbounded, while always true, has become strikingly evident of late.[5]

The Legislature is powerless to increase an appropriation appearing in the Governor's Budget Bill, Md. Const. art. III, §52(6). If the Legislature wished to

[5] Witness New York City's current fiscal plight, and, what perhaps could become even more disturbing, the monetary problems of the Commonwealth of Massachusetts. *See, e.g.*, TIME, October 20, 1975, at 9-18; *Going Broke The New York Way*, FORTUNE, August 1975, at 144; *Public Employees vs. The Cities*, BUSINESS WEEK, July 21, 1975, at 50; *Massachusetts Fears Own Default*, The Washington Post, November 2, 1975, at A-3, cols. 1-4.

comply with the FLSA by enacting a Supplementary Appropriation Bill, it would have to enact a specific revenue raising measure to support it, Md. Const. art. III, §52(8)(b).[6] Even if such supplementary legislation was passed, the Governor could then veto it, Md. Const. art. III, §52(8)(d); Md. Const. art. II, §17.[7] Or, the situation could arise where the Governor allocates adequate funds in the Budget Bill to meet the FLSA, but the Legislature votes for a reduction below the minimum compliance level, Md. Const. art. III, §52(6). Either way, the question which would eventually have to be faced is how could a remedy be effected?

Under these circumstances, 29 U.S.C. §215(a)(2), making it unlawful to violate the minimum wage provisions of the Act, and the penalty provisions of 29 U.S.C. §216(a), (b), would be brought into play. For violation of the FLSA, section 216(a) provides for maximum penalties of a $10,000 fine and six months imprisonment. Section 216(b) makes an employer violating the minimum wage provisions of sections 206

[6] Whether one such Supplementary Appropriation Bill could pass constitutional muster if it was designed to raise additional funds to pay different types of employees is questionable in light of Md. Const. art. III, §52(8)(a), which requires such Bills to be "limited to some single work, object or purpose." *See* Panitz v. Comptroller of the Treasury, 247 Md. 501, 232 A.2d 891 (1967); Mayor & City Council v. O'Conor, 147 Md. 639, 128 A. 759 (1925); Note, 28 Md. L. Rev. 395 (1968).

[7] A Maryland Governor, unlike the President of the United States, is not always confronted with the all or nothing choice of vetoing or approving a piece of legislation in its entirety. In the case of "Bills making appropriations of money embracing distinct items," the Governor is vested with the power of vetoing individual items. *See* Md. Const. art. II, §17.

and 207 liable to the affected employees in the amount of unpaid minimum wages plus an equal sum as liquidated damages.

Could the Governor be fined or imprisoned pursuant to section 216(a) if his Budget Bill or veto was determined to have caused a violation of the Act? Could the entire Legislature be jailed or assessed if its reduction of an item in the Budget Bill brought about a violation? If so, would the penalty be imposed on the whole body or just upon individual members who voted the reduction?

Section 216(b) accords aggrieved employees the right to maintain suit for double damages "in any court of competent jurisdiction." Surely such a suit could not be maintained in federal court because of the Eleventh Amendment's prohibition of such litigation. Suits by private parties which seek "to impose a liability which must be paid from public funds in the state treasury [are] barred by the Eleventh Amendment," *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S. Ct. 1347, 1356 (1974). *See also Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 93 S. Ct. 1614 (1973) (Eleventh Amendment bars employee federal court FLSA suits against employer-States). No amount of congressional intent to the contrary can overcome this proscription. The Constitution, *per force*, has been held to prevail over statutes since 1803, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), if not earlier.[8]

[8] *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 398-400 (1798) (Iredell, J.); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792); *cf.* Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796).

Resort to the Maryland courts would prove valueless because of the sovereign immunity which the State enjoys in its own tribunals, *Charles E. Brohawn & Bros., Inc. v. Board of Trustees*, 269 Md. 164, 304 A.2d 819 (1973). Admittedly, this is a question which this Court did not reach or dispose of definitively in *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, supra*, 411 U.S. at 287, 93 S. Ct. at 1619, but prior decisions indicate that the assertion is accurate. In *Testa v. Katt*, 330 U.S. 386, 394, 67 S. Ct. 810, 814-15 (1947), this Court held that an action on a federal statute could be maintained in Rhode Island's courts where the circumstances were such that a similar "claim arising under Rhode Island law would be enforced by that State's courts." If the law of Maryland did not provide for a similar action, the State courts would not have to enforce the federal FLSA according to *Testa v. Katt, supra. See also* Note, *State Enforcement of Federally Created Rights*, 73 Harv. L. Rev. 1551, 1555 (1960).[9]

The Secretary of Labor, as the alter ego of the United States, is not constitutionally prohibited from enforcing the FLSA by initiating a lawsuit against a State in federal court, *Brennan v. Iowa*, 494 F.2d 100 (8th Cir. 1974). However, although he possesses the apparent statutory authority to sue for money damages, 29

[9] *But see* Clover Bottom Hosp. & School v. Townsend, 513 S.W.2d 505 (Tenn. 1974), *appeal dismissed*, 95 S. Ct. 2410 (1975) (decided without benefit of any *Testa v. Katt* analysis or mention of Tennessee's law on the subject).

U.S.C. §216(c),[10] such a monetary recovery would run roughshod over the Maryland Constitution. In order to satisfy the judgment, funds would have to be withdrawn from the State Treasury in direct violation of the provision of the Maryland Constitution which states that "[n]o money shall be drawn from the Treasury of the State, by any order or resolution, nor except in accordance with an appropriation by Law," Md. Const. art. III, §32. If the State Treasurer or Comptroller made such a withdrawal, he would be acting in violation of his oath of office and constitutionally imposed duties, Md. Const. art. VI, §§2, 3.

Whether or not a finely delineated path through the constitutional jungles could be located and followed to a point where Maryland's constitutional provisions would be set aside is not the central point of this argument. It is one thing for the Constitution of the United States to take precedence over an isolated, detachable provision of a State constitution in the proper case, *e.g., Reitman*

[10] Quaere whether this apparent authority is capable of withstanding constitutional challenge. The Secretary of Labor, under certain circumstances, is clothed with the discretionary power of suing to recover an amount claimed due under the FLSA. However, the statute further provides that any such monies recovered "shall be paid" to the employees affected, 29 U.S.C. §216(c). Although the United States may maintain federal lawsuits against States without violating the Eleventh Amendment, United States v. Mississippi, 380 U.S. 128, 85 S. Ct. 808 (1965), where the United States unabashedly stands precisely in the shoes of a private citizen and maintains a suit for money damages against a State, which, if successful, would require any recovery to be paid to that citizen, it would seem highly questionable, if not absurd, to contend that the Eleventh Amendment could be circumvented by such a thinly veiled statutory assignment of rights. It is not difficult to foresee how such a device could transform the Eleventh Amendment into a nullity. Certainly United States v. Mississippi, *supra*, does not sanction any such legerdemain.

v. Mulkey, 387 U.S. 369, 87 S. Ct. 1627 (1967). It is quite another to employ a mere statute of, to say the least, dubious constitutionality, to abrogate many intertwined constitutional provisions with the result that a State's complex budgetary mechanism can be made a shambles at the federal government's whim.

Similarly, although the State of Maryland does not wait apprehensively for the imminent arrest of its Governor or the members of its General Assembly by federal marshals, if the FLSA Amendments of 1974 are allowed to stand, and if *Maryland v. Wirtz, supra*, is extended, the eventuality could arise. That this is not hysterical speculation may be gleaned from an examination of certain bills currently pending before Congress. *See, e.g.*, H.R. 10130, 94th Cong., 1st Sess. (1975) (A bill which provides for automatic increases in the minimum wage rate, and requires an overtime rate two and one-half times the regular wage rate.); H.R. 9137, 94th Cong., 1st Sess. (1975) (A bill which would deny States any funds under the State and Local Fiscal Assistance Act of 1972, 85 Stat. 191 (1972), if a State does not satisfy the Secretary of the Treasury that it is in compliance with the FLSA of 1938.); H.R. 2320, 94th Cong., 1st Sess. (1975) (A bill which would amend the Internal Revenue Code "to prohibit States from denying unemployment compensation to individuals who are unavailable for work because of temporary illness."); H.R. 77, 94th Cong., 1st Sess. (1975) (A bill which provides that State and municipal employees shall be subject to the National Labor Relations Act, which would, *inter alia*, entitle them to bargain collectively.). Regrettably, many of the fears expressed by the dissenting Justices in *Wirtz* have been borne out since 1968, *Maryland v. Wirtz, supra*, 392 U.S. at 201-05, 88 S. Ct. at 2026-28 (Douglas, J., dissenting). Fortunately,

however, the States do not appear before this Court armed only with policy arguments over the wisdom *vel non* of the FLSA of 1938, or of the 1974 Amendments. Indeed, such debate is inappropriate in this tribunal. It is the Tenth Amendment to the Constitution of the United States which, as is fully expounded in the Brief for Appellants, provides the legal elixir for the States, and demands that they prevail in this appeal.

"Among the states Maryland was a pioneer in inaugurating [the Executive Budget System] for controlling appropriations, and its example has been followed quite generally throughout the nation," *McKeldin v. Steedman, supra,* 203 Md. at 99, 98 A.2d at 564-65 (Sobeloff, C.J.). It is the constitutional design of the System to assure that Maryland's fiscal requirements cannot be enlarged beyond those fixed in the Governor's Budget. Although not inflexible, this assurance is effectively secured through operation of the System's "key idea . . . that legislators will be less facile in passing Supplemental Appropriation bills if they must in the same act assume the uncongenial task of directing a specific tax," *id.* at 99, 98 A.2d at 565.[11] If the safety mechanisms which are built into the Budget System can be obliterated by application of the 1974 Amendments to the FLSA, Maryland's fiscal integrity will be severely jeopardized.

The importance of a sound fiscal system to the well being of good State government cannot be minimized.

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[11] "The clear insistence of Section 52 that the *onus* of imposing a tax shall go hand in hand with the granting of public monies is not based upon abstract political theory but is the result of the State's alarming experiences under the practice of legislatively-initiated appropriations which flourished without restraint before the Budget Amendment," McKeldin v. Steedman, *supra,* 203 Md. at 100, 98 A.2d at 565.

In 1951, Simon E. Sobeloff,[12] Chairman of the Commission on Administrative Organization of the State of Maryland, wrote to Maryland Governor McKeldin in the transmittal letter accompanying the Commission's First Interim Report, titled "The Maryland Budget System":

> Money, the life blood of all governmental operations, is being taken from our people in ever increasing amounts by the taxing processes of the State and of other governmental units. The public welfare as well as sound public morals requires that this money be wisely and frugally spent. A good budget system is an essential means not only to allocate monies to particular purposes but also to exercise control over spending agencies to assure that funds shall be spent as intended and in an efficient manner. Budgeting for large scale operations, whether in business or in government, requires the proper use of intricate technical devices.

Letter from Simon E. Sobeloff to Governor Theodore R. McKeldin, Oct. 29, 1951, in The Maryland Budget System, First Interim Report, Commission on Administrative Organization of the State of Maryland 3 (1951).

The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," U.S. Const. amend. X. It "stands as a constant reminder that the states were not intended to deteriorate into historical oddities," Cowen, *What is Left of the Tenth Amendment?,* 39 N.C. L. Rev. 154, 183 (1961).

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[12] Later Chief Judge of the Court of Appeals of Maryland, 1952-54; Solicitor General of the United States, 1954-56; United States Circuit Judge, 1956-73.

Mr. Justice Brennan has written that "the possibilities for collision between government activity and individual rights will increase as the power of government itself expands, and this growth in turn heightens the need for constant vigilance at such collision points," Brennan, *Extension of the Bill of Rights to the States,* 44 J. Urban L. 11, 21 (1966). This case presents a collision between an overexpansion of federal activity and the rights of the individual States. To paraphrase Mr. Justice Brennan, "if federalism is to endure, those who govern must recognize the integrity of the States and accept the enforcement of constitutional limitations on their power," *id.* This cannot be accomplished if the States are compelled to adhere to the 1974 Amendments under the threat of injunctive and criminal sanctions. *See Maryland v. Environmental Protection Agency,* No. 74-1007 (4th Cir., decided Sept. 19, 1975). National legislation may impose weighty burdens upon private enterprise which may be so stringent as to command such an entity to close its doors. *See* National Prohibition Act (Volstead Act), 41 Stat. 305 (1919), *repealed,* Act of August 27, 1935, 49 Stat. 872 (1935). However, regulating private businesses and attempting to control a State's governmental apparatus are two entirely distinct propositions. The "business" of States is State government. Government is the *raison d'ètre* of the States, and they have the constitutional right and duty to conduct their internal operations as they see fit.

> The powers delegated by the proposed Constitution to the federal government are *few* and defined. *Those which are to remain in the State governments are numerous and indefinite.* The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, at 292-93 (Mentor ed. 1961) (J. Madison) (emphasis supplied).

The 1974 Amendments to the FLSA represent an unconstitutional encroachment on the rights reserved to the States by the Tenth Amendment.[13] The idea that the end justifies the means has no place in our constitutional law. Mr. Justice Stone once characterized the Tenth Amendment as a "truism," *United States v. Darby,* 312 U.S. 100, 124, 61 S. Ct. 451, 462 (1941). But it is more than that. A few years before, Mr. Chief Justice Hughes delved more deeply into the Tenth Amendment's prominent position in our federal system in *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 528-29, 55 S. Ct. 837, 842-43 (1935):

> The Constitution established a national government with powers deemed to be adequate . . . but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment—'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'

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[13] "There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments," United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4, 58 S. Ct. 778, 783 n.4 (1938).

CONCLUSION

For the reasons expressed herein, and in the Brief for Appellants, the 1974 Amendments to the Fair Labor Standards Act of 1938, insofar as they purport to apply to the States, cannot survive constitutional scrutiny. Accordingly, the Order of the District Court must be reversed, and the declaratory and injunctive relief prayed for below granted.

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November 1975

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1975

THE NATIONAL LEAGUE OF CITIES, ET AL.,
APPELLANTS

v.

W. J. USERY, JR., SECRETARY OF LABOR

THE STATE OF CALIFORNIA, APPELLANT

v.

W. J. USERY, JR., SECRETARY OF LABOR

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLEES' RESPONSE TO APPELLANTS' SUPPLEMENTAL BRIEF ON REARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-878

THE NATIONAL LEAGUE OF CITIES, ET AL.,
APPELLANTS

v.

W. J. USERY, JR., SECRETARY OF LABOR

No. 74-879

THE STATE OF CALIFORNIA, APPELLANT

v.

W. J. USERY, JR., SECRETARY OF LABOR

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLEE'S RESPONSE TO APPELLANTS' SUPPLEMENTAL BRIEF ON REARGUMENT

This short factual statement is submitted in response to the supplemental brief filed by appellants

on February 24 in No. 74-878, and to two amicus briefs filed after the submission of our supplemental brief.[1] We do not intend to burden the Court with additional argument. But appellants' new "cost" estimates are based on so many misconceptions of the Act's requirements, and their brief so misconstrues the Labor Department's procedures and the impact data relied upon by Congress, that some response is necessary to correct, with more specificity than would be permitted by oral argument, the more significant errors.

In dealing with the considerable number of misunderstandings and errors underlying the factual assertions in question, it is inevitable that an impression of difficulty and complexity should appear, at first blush, in the application of the Act to public bodies. But such confusion as exists lies not in the Act or the regulations, but in the failure of appellants and many of their members to examine closely the limited provisions of the Act of special concern to them, and to take advantage of the direct channels of explication available to them along with all other employers.

Thus, while the National Association of Counties' brief, at page 16, complains of the 50 provisions of the Act defining exemptions from its requirements (see also The Municipal Law Officers' brief, p. 38), in fact only 6 have any substantial pertinence: Sec-

[1] These amicus briefs were filed on behalf of the National Institute of Municipal Law Officers, and the National Association of Counties.

tion 7(b) relating to overtime pursuant to a collective bargaining agreement; Section 7(j) relaxing the overtime requirement for hospitals; Section 7(k) relaxing the overtime requirement for law enforcement and fire protection activities; Section 13(a)(1) excluding white collar workers; Section 13(a)(3) exempting recreational establishments; and Section 13(b)(7) providing an overtime exemption for local transportation systems. Of these, only Section 7(k) has particular pertinence to public bodies, the rest being broadly applicable to employers generally and having a long history of settled judicial construction.

In view of the Act's relative simplicity, it is by no means clear that a majority of National League's 15,000 members share the misconceptions reflected in the excerpts from the letters quoted in appellants' supplemental brief. Moreover, these letters—which were solicited by National League from among its members (suppl. br., p. 7)—were, in general, written by personnel officers with no prior experience in dealing with the Act. Had the newly covered public bodies availed themselves of the normal channels of information long used by private employers, the misunderstandings would in great part have been avoided.[2]

1. *Appellants' new "cost" estimates.* Appellants' revised cost estimates, like their earlier versions, are

[2] According to the Labor Department's enforcement office for the Wage and Hour Division, its employees spent 21 percent of their budgeted time in fiscal 1975 on informational and explanatory assistance.

not substantiated by any explanatory information or underlying cost data. Indeed, the brief does not even reproduce the letters from which the conclusory cost statements were taken.[3] Where appellants' brief does contain such data, substantiating or explaining the cost estimates, it is apparent as shown in our original brief, that their cost estimates are largely based on a misconception of the Act's requirements.[4]

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[3] In the one case where the letter was reprinted (see suppl. brief's appendix, 1a), appellants' summary of that letter was inaccurate. Thus, the brief states that the International City Management Association has determined "that the cost of the Labor Act Amendments here challenged, to Cities over 10,000 population alone, will be over one billion dollars ($1,000,000,000.00) *per year*" (suppl. br., p. 6). According to the actual letter, however, this cost estimate was "for *all* cities" (emphasis added), including those with populations under 10,000 (suppl. br., appendix 1a).

[4] These same errors and misconceptions permeated appellants' original brief. For example, their earlier $200 million estimate for fire departments overlooked the qualifying statement in the letter from which the information was taken that only $30.4 million (or 15%) of the total estimate reflected additional compensation due under the Act for hours worked in excess of 60 per week. (Under Section 7(k) of the Act, fire departments were relieved of any overtime obligation until the employees' weekly hours, averaged over a 28-day period, exceeded 60—58 after January 1, 1976.) Eighty-three percent of the $200 million dollar estimate ($165.8 million) was based on the assumption that numerous local governments, despite the Section 7(k) partial overtime exemption, would pay overtime after 40 hours. See our original brief, pp. 49-50, and our motion to affirm, pp. 22-23, n. 19. Other similar mistakes are corrected in our original brief, pp. 47-53, and in our supplemental brief, p. 7, n. 2.

Appellants' largest cost estimates are for fire protection and law enforcement personnel. These estimates, as appears even on appellants' incomplete data, are based on incorrect assumptions concerning the Act's application. For example, the City of Milwaukee (appellants' suppl. br., p. 20, n. 15) reports that in the first two quarters of 1975 its employees worked 30,000 overtime hours, for which they were paid "comp-time." Of these overtime hours, 20,000 were worked by the police department and the City assumes that, if the Act had been in effect, it would have had to pay for these hours in cash at an additional cost to the City of $200,000. In fact, however, unlike Milwaukee's own practice which is to pay overtime (or comp-time) after 40 hours (*Police Departments in the United States*, Fraternal Order of Police, National Lodge, A Survey of 1975 Salaries and Working Conditions (24th Ed., 1975), p. 1), the Fair Labor Standards Act does not require overtime rates for police until their hours, when averaged over a 28-day period, exceed 60 a week (or 58 after January 1, 1976). The hours worked between 40 and 60 (or now 58), as specifically stated in the Secretary's Regulations (29 CFR 553.19, 39 F.R. 44147 (December 20, 1974)), and in our original brief (pp. 52-53), can lawfully be paid for in comp-time. This same rule would, of course, apply to overtime hours worked by fire protection personnel, who undoubtedly account for a large part of Milwaukee's remaining 10,000 overtime hours.

Presumably, these same facts would dramatically

reduce, if not eliminate, the $8.65 million first year cost estimate by Los Angeles (appellants' suppl. br., pp. 9-10), since Los Angeles likewise provides comp-time or other overtime compensation for all weekly hours over 40 (*ibid.*; see also our original br., pp. 52-53). And Des Moines' estimate of $70,000 overtime costs for its police and fire budgets (appellants' suppl. br., p. 12, n. 5) would also be reduced if, as seems likely, its count of overtime hours referred to hours over 48 per week—since the City pays overtime or comp-time after 48 hours per week (*Police Departments in the United States*, *supra*, p. 2; *Personnel, Compensation, and Expenditures in Police, Fire, and Refuse Collection and Disposal Departments*, Urban Data Service, A Report (1975), p. 6, Table 8).

It is extremely doubtful that many of the cost estimates supplied to appellants were based on workweeks in excess of 60 hours. According to the 1975 Urban Data Service Report, *supra*, most police departments have a standard workweek of 40 hours or less (p. 2, Table 2). Moreover, a survey of 1,031 fire departments showed a mean regular workweek of 53 hours. See 1975 Urban Data Service Report, p. 6, Table 8. The average for cities the size of Des Moines (100,000-249,999) was 54 hours (*ibid.*).

Even after the narrowing of the Section 7(k) exemption on January 1, 1977 (which will require overtime after 54 hours), the actual increase in overtime costs will be relatively small for fire protection personnel. The 40% increase referred to by Carmel,

Indiana, was apparently based on the erroneous assumption that fire fighters would have to be paid overtime after 40 hours. Under Carmel's current system, during each 28-day period, the city employs three crews of eight firefighters each. Two of the crews work 216 hours during this period, while one crew works 240 hours. This results in a total of 5,376 hours worked by the three crews of employees during the 28-day period.[5] If these employees were each permitted to work only 40 hours per week, or 160 hours in the 28-day period, the total hours worked by the city's 24 firefighters during each 28-day period would be reduced to 3,840 hours, which is 1,536 hours less than they presently work.[6] To make up these hours, Carmel would have to employ an additional 9.6 employees, which is the basis of the 40 percent increase in manpower which they have asserted to be necessary (suppl. br., p. 11, n. 4).[7]

In reaching this asserted result, however, Carmel overlooks the fact that the same 24 employees now employed could continue to work their presently scheduled shifts, except that one crew of eight employees would work 8 overtime hours each 28-day period (the difference between the 240 hours they would work and the 232 hours maximum provided by Section 7(k)). This would result in a total of

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[5] 16 employees x 216 hours plus 8 employees x 240 hours = 5,376 hours.

[6] 24 employees x 160 hours = 3,840 hours.

[7] 1,536 hours divided by 160 hours = 9.6 employees; 24 employees x .40 = 9.6 employees.

64 overtime hours (8 employees on the crew, each working eight overtime hours). These 64 hours for which the overtime premium must be paid are only 1.19 percent of the 5,376 hours worked by Carmel's firefighters during the 28-day period. Since these employees are already being paid at their regular rate for all hours worked, the only additional cost to the city would be the 50 percent overtime premium, or 0.6 percent of the pay for the total hours worked (one-half of 1.19 percent), a substantially lower figure than the 40 percent asserted by Carmel. Since the total hours worked during 1976 is expected to cost $316,442, payment of the overtime premium for this year will cost the city $1,898.65 (.006 x $316,-442).

After January 1, 1977, when the maximum-hours standard for firefighters is reduced to 216 hours in a 28-day period, one of Carmel's eight-employee crews would work 24 overtime hours during each 28-day period, while the other two crews would continue to work no overtime hours. The total additional annual cost of paying for these overtime hours during 1977 would be $5,695.96, representing a 1.8% increase in cost, still substantially lower than the asserted 40 percent.[8]

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[8] The total overtime hours worked by the crew will be 192 (8 x 24). This number of overtime hours is 3.6 percent of all hours presently worked (192 divided by 5,376). Since the overtime premium is 50 percent, the percentage increase in cost would be only half that amount, or 1.8 percent (3.6 percent divided by 2). Based on the City's figure of $316,442.00, this would increase their cost by $5,695.96.

The same percentage increases would occur at Los Altos (suppl. br., p. 14, n. 6) where the employees worked the same schedule. The increased costs there (assuming that the City's underlying computations are based on an accurate count of nonexempt employees), would be $11,533 in 1976 and $34,600 in 1977. Based on the Los Altos population of 40,000, this additional overtime cost amounts to 28 cents per person in 1976 or 84 cents per person in 1977. Los Altos also estimates that compliance with the Act for its student firefighters will cost an additional $16,200 (suppl. br., p. 31, n. 29). This estimate apparently overlooks the fact that Section 3(m) of the Act allows a credit for the cost of providing room (and, where applicable, board) to the student firefighters, who live at the station while attending school.

2. *Factual errors concerning the Act's requirements.* Most of the cities reporting program reductions and cost increases if the Act were applied did so on the basis of misinformation concerning the Act's requirements. For example, Oshkosh, Wisconsin, reports that its "greatest problem" is the Act's requirement that it pay all park, golf course and bridge tending employees overtime after 40 hours, instead of allowing them to accumulate comp-time to be used in the colder months when activity in these departments declines (suppl. br., p. 23, n. 19). In fact, from the limited information given in appellants' brief, it would appear that Oshkosh could continue this same practice under Section 7(b) of the

Act, which would not require any overtime until the employee had actually worked more than 2080 hours in the year or until the employee's hours in any one workweek exceeded 56, in which event overtime would only be paid for those hours over 56. Moreover, it is highly likely that the park and golf employees are completely exempt from the Act's overtime and minimum wage requirements as a result of Section 13(a)(3) which applies to any recreational establishment whose activities are seasonal.

Equally erroneous is appellants' suggestion that cities have to pay overtime for 24 hours, 7 days a week, when snow removal crews are on stand-by (suppl. br., p. 24). "Stand-by" time is only compensable if the employee's freedom is so circumscribed that he or she cannot use the time for personal pursuits. Thus, no compensation need be paid if the employee is only required to leave a number where he can be reached, or is free to use the time at home in the same way he would normally use such time—as, for example, to sleep at night. See 29 CFR 553.14(a); 29 CFR 785.14-785.23.

The complaints expressed by Englewood, California (suppl. br., p. 24, n. 22) are also groundless. Englewood states that the Act required it to hire a full-time bookmobile driver where before firefighters took turns on their day off. If the firefighters were volunteering as an exercise of civic duty (*e.g.*, driving a bookmobile to hospitals or nursing homes), they could have continued to do so without subjecting the city to obligations under the Act. See 29 CFR 553.11(d).

If however, the firefighters were being paid for the bookmobile work, it presumably would not cost the city any more to replace them with one full-time driver. The other complaint made by Englewood is equally unfounded. Library employees who arrive at work early and who, while waiting for business hours to start, pick up the telephone to answer sporadic or occasional calls, are not entitled under the Act to any extra compensation. See *Nunn's Battery & Electric Co.* v. *Wirtz*, 335 F.2d 599, 601 (C.A. 5).

Similarly, contrary to the suggestion in appellants' supplemental brief (suppl. br., pp. 27-28), the Act does not require public employees to terminate their participation in a city's recreation program as volunteer coaches or athletic directors or to terminate their membership in a volunteer fire department. Thus, the Secretary's Regulations specifically state that "[v]olunteers engaged in fire protection or law enforcement activities may include individuals who are employed in some other capacity by the same public agency. For example, * * * an employee of a village Department of Parks and Recreation may serve as a volunteer firefighter in his or her local community" (29 CFR 553.11(c)).*

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* In White Bear Lake, Minnesota, where the "volunteer" firemen are paid $4.00 an hour for time spent on fire calls, it would appear (in the absence of more information) that they are "employees" and not volunteers. The Secretary's Regulations recognize that volunteers will almost always receive some pay (either to qualify them for workers compensation or to reimburse them for out-of-pocket expenses), and "[p]ayments which average $2.50 per call will be considered

Nor do interns and students working in various branches of State and local government have to be paid in accordance with the Act's requirements (suppl. br., p. 31, n. 28) if they are not working in contemplation of pay, and are not replacing regular employees, but are performing the work under close supervision as part of their education or learning. See *Walling* v. *Portland Terminal Co.*, 330 U.S. 148.

Other cities have expressed the mistaken belief that the Act requires compensation at overtime rates for training which the employee takes on a voluntary basis (suppl. br., p. 26, n. 23, Brewer, Maine, and Vacaville, California). The Regulations specifically state that "training * * * which is not required but which may incidentally improve the employee's performance of his or her regular tasks or prepare the employee for future advancement, need not be counted as working time even though the public agency may pay for all or part of such training" (29 C.F.R. 553.7). Moreover, even where the training is required, the only hours which must be paid for are the actual course or training hours, and not the time spent in studying or in other personal pursuits (Regulations, 29 CFR 553.7).

Englewood, Colorado, erroneously states that the Act's prohibitions against age discrimination would require it to hire a 64-year-old into its police cadet

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nominal" and will not affect the individual's volunteer status. 29 CFR 553.11. Larger payments could also be made but they would have to be justified in accordance with standards stated in the Regulations.

program. This simply is not so. While the city could not restrict its program, as it currently does, to individuals between the ages of 18 and 21 (as it has been advised), it certainly could justify refusing to hire a 64-year-old based on the costs and time involved in training in relation to the necessarily short service potential. The Act specifically recognizes an exception for "reasonable factors other than age" and for "a bona fide occupational qualification reasonably necessary to the normal operation of the particular business" (29 U.S.C. 623(f)).

Charlotte, North Carolina, is also incorrect in stating that its overtime obligation for its sanitation employees will be computed by dividing their weekly salary by 35 (*i.e.*, the average number of hours they actually work) and applying the statutory time-and-a-half factor to that amount. If the facts are as stated in appellants' brief, and the employees understand that their salary is for all hours up to 40, then their regular rate for overtime purposes is computed by dividing their salary by 40, and not by the average number of weekly hours worked. See 29 CFR 778.113a.

Appellants also contend that the Secretary's recent amendments to the Regulations defining executive, administrative and professional employees (who are exempt from the Act's minimum wage and overtime requirements by virtue of Section 13(a)(1)) "result[ed] * * * [in] broader coverage under the Act * * * [and] in additional overtime expenses for heretofore partially exempt personnel" (suppl. br.,

pp. 49-50). The only change made in the regulations was to revise the salary tests from $125 a week for executive and administrative employees and $140 a week for professional employees, which tests were established in May 1973, to $155 a week for executive and administrative employees and $170 a week for professional employees (29 CFR 541.1, 541.2 and 541.3; 40 F.R. 7092 (February 19, 1975)). These salaries would yield a yearly income of $8060 and $8840. Since the national median income for all full-time workers in 1974 was $10,066 (and $11,840 for men),[10] it would not seem that these increased salary tests of $8060 and $8840 would exclude from the Section 13(a)(1) exemption any employee who could otherwise qualify as an "executive," "administrative," or "professional" employee.

Appellants' brief is mistaken in suggesting that working patients under the Act must be paid the same as regular employees and that they must also be paid for work therapy. It is clear from the Regulations that patients do not have to be paid for performing personal housekeeping chores or for making craft products, which they do voluntarily as part of their therapy. They do have to be paid for work which has a consequential economic benefit to the institution. See Regulations, 29 CFR 529.2(d). This pay, however, can be less than the pay of regular employees and, indeed, less than the minimum wage,

[10] U.S. Department of Commerce, Bureau of the Census, *Money Income and Poverty Status of Families and Persons in the United States: 1974*, pp. 1-2, 14, Table 10.

if a handicapped certificate is obtained. Depending on the degree of the handicap, the wage can be less than 25 percent of the minimum. *Ibid.*

The assertion that the Labor Department has assigned more than 1,000 investigators to enforce the Act's requirements in mental institutions is incorrect (suppl. br., p. 35). The Department's total number of investigators is 1,135, and they audit compliance with 8 major laws (including the Fair Labor Standards Act, Age Discrimination in Employment Act, Davis-Bacon Act, Walsh-Healey Public Contracts Act, Contract Work Hours Standards Act, Service Contract Act, Farm Crew Leader Registration Act, and the garnishment provisions of the Consumer Credit Protection Act) as well as provisions in 70 other statutes, including the Water Pollution Control Act. Obviously, only a small percentage of the 70,000 investigations conducted each year will be at public hospitals and institutions. Thus, during the period from February 1, 1975, through July 21, 1975, the Department investigated working patients at only 72 hospitals and mental institutions (40 of which were public). Moreover, the Act's coverage of patients working in public hospitals and institutions does not result from the 1974 Amendments here challenged, but from the 1966 Amendments upheld in *Maryland* v. *Wirtz*, 392 U.S. 183.

In a somewhat similar vein, the Metropolitan Government of Nashville states that it will be required to spend "thousands of man hours * * * working with the inspectors and investigators of the Wage

& Hour Division" (suppl. br., p. 4). We are advised by the Division's enforcement office that the average time spent on an FLSA investigation is 16 hours and not the thousands anticipated by Nashville. Moreover, even if the investigation is a major one involving more than 16 hours, most of the time is spent reviewing payroll data and other routine employment records, and there is thus little disturbance to the employer's work force.

Finally, appellants are simply incorrect in their repeated assertion that the Act will subject public employers to class actions and triple damages (suppl. br., pp. 34, 51; see also Municipal Law Officers' br., pp. 7, 51). Section 16(b) originally provided that "any one or more employees * * * may designate an agent or representative to maintain [an] action for and in behalf of all employees similarly situated" (52 Stat. 1060, at 1069). However, Section 5 of the Portal-to-Portal Act of 1947, for the stated purpose of "bann[ing] * * * representative actions" (61 Stat. 84, 87), deleted this clause and substituted a new sentence stating that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed with the court" (29 U.S.C. 216(b)). Thus, the use of class actions in suits brought under the FLSA (and under the Age Discrimination in Employment Act which incorporates Section 16(b) (29 U.S.C. 626(b)) is specifically precluded. See *LaChapelle* v. *Owens-Illinois, Inc.*, 513 F.2d 286 (C.A. 5); *Clougherty* v. *James Vernon Co.*, 187 F.

2d 288, 290 (C.A. 6), certiorari denied, 342 U.S. 814.[11]

There is also no basis for the assertion that employers are subject to triple damages under the Act. Sections 16(b) and 16(c) of the FLSA authorize liquidated damages up to an amount equal to the amount of unpaid minimum wages or overtime compensation.[12] This additional amount, however, may not be awarded if the court finds that the employer had acted in "good faith" and had "reasonable grounds" for believing that he was not violating the Act's requirements (Section 11 of the Portal-to-Portal Act, 29 U.S.C. 260). See also Section 7(b) of the ADEA which requires a finding that the violations were "willful" (29 U.S.C. 626(b)).

Appellants' other concern that public officials will be subject to the Act's criminal sanctions is also unfounded. In fiscal 1974, only 1 of the 1,758 FLSA suits filed by the Secretary sought criminal sanctions. The Act specifically provides that no criminal sanctions can be applied unless the violations were

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[11] *Souder* v. *Brennan*, 367 F.Supp. 808 (D. D.C.), cited by appellants as an example of an FLSA class suit (suppl. br., p. 34), was not a suit brought against an employer to recover back wages, but a suit brought against the Secretary to compel him to enforce the Act with respect to working patients.

[12] The Act's liquidated damage provision is intended to compensate employees "for the retention of [their] * * * pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages" (*Overnight Motor Co.* v. *Missel*, 316 U.S. 572; *Brooklyn Bank* v. *O'Neil*, 324 U.S. 697, 707).

"willful" (Section 16(a), 29 U.S.C. 216(a)) and the maximum penalty for a first conviction is "a fine of not more than $10,000" (*ibid.*). Imprisonment can only be imposed for a second criminal conviction and then only up to six months. We think it can be assumed that no public official will violate the Act's requirements with the criminal intent necessary to sustain even a first conviction.

3. *Data supporting Congress' cost estimates.* Appellants express "candid doubt" that 95,000 state and local government employees were paid less than the minimum wage established by the 1974 Amendments (suppl. br., pp. 54, 57; National Association of Counties' br., pp. 3, 5). They also claim that Congress' estimate of the cost impact of the Act's overtime provision was based on a survey of "scheduled workweeks" and not on a survey of actual hours worked (suppl. br., p. 5).

These assertions are groundless. The challenged estimates were based on a nationwide survey of state and local governments (excluding schools and hospitals) conducted by the Government Division of the U.S. Bureau of Census, which obtained data on the actual wages paid and the actual hours worked for a payroll period in March 1970.[13] These data were supplied by the employers themselves. The table prepared from the data shows the number of employees at each five-cent interval starting at "under $1.00"

[13] *Nonsupervisory Employees in State and Local Governments*, U.S. Department of Labor, Workplace Standards Administration, 1971 Report to Congress, pp. 7, A-1, A-4.

and going to "under $2.50." (The minimum wage applicable to the private sector at the time of the survey was $1.60.) As appears from the table (reprinted *infra*, p. 21) almost 250,000 state and local government employees were paid less than $1.90 in March 1970. Other tables were prepared showing the numerical distribution of employees by weekly hours worked.[14]

The survey information on wages and hours was brought up to date for Congress in 1973. See *Background Material on the Fair Labor Standards Act Amendments of 1973*, 93d Cong., 1st Sess., pp. 220, 222, n. 1. For example, during the period from 1970 to 1973, the hourly earnings of state and local government employees increased by 23 percent.[15] Assuming that the wages of the lowest paid employees increased proportionately, those who had previously earned under $1.55 would predictably still be earning under $1.90. Their number was also increased to reflect the intervening increase in public employment. Based on similar computations, the Secretary, in his most recent report to Congress, estimates that 90,000 state and local government employees (excluding schools and hospitals) are paid less than the presently applic-

[14] *Id.*, A-21.

[15] *Public Employment*, U.S. Department of Commerce, Bureau of the Census (1970 and 1973).

able minimum wage of $2.20.[16] See Table, *infra*, p. 22.

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[16] *Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act*, U.S. Department of Labor, Employment Standards Administration, An Economic Effects Study Submitted to Congress, 1976, p. 9.

STATE AND LOCAL GOVERNMENTS (EXCLUDING EDUCATION AND HOSPITAL INSTITUTIONS)

Table 2. Cumulative Numerical Distribution of Nonsupervisory Employees, by Average Straight-Time Hourly Earnings and Sex, United States and Regions: March 1970

Item	United States			Northeast			South			North Central			West		
	Nonsupervisory employees														
	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female
Average hourly earnings:															
Under $1.00	10,863	6,546	4,317	4,339	2,449	1,890	2,859	1,550	1,309	3,073	2,182	891	592	365	227
Under $1.05	15,745	9,159	6,587	5,017	2,650	2,368	5,002	3,000	2,002	4,919	3,053	1,866	807	457	350
Under $1.10	17,651	10,033	7,618	5,739	2,868	2,871	5,616	3,367	2,250	5,304	3,265	2,039	992	534	458
Under $1.15	20,694	11,736	8,958	6,318	3,033	3,285	6,974	4,245	2,728	6,208	3,794	2,414	1,195	665	530
Under $1.20	23,065	13,095	9,970	6,958	3,382	3,575	7,781	4,755	3,026	6,977	4,220	2,757	1,349	738	611
Under $1.25	26,403	14,727	11,676	8,155	3,724	4,431	9,322	5,787	3,535	7,456	4,429	3,027	1,470	787	683
Under $1.30	35,020	20,159	14,861	9,075	4,132	4,943	13,382	8,747	4,635	10,335	6,062	4,274	2,227	1,217	1,010
Under $1.35	39,473	22,553	16,921	9,637	4,527	5,110	15,813	10,167	5,646	11,539	6,536	5,002	2,485	1,323	1,162
Under $1.40	44,193	25,394	18,798	10,313	4,864	5,449	17,876	11,751	6,125	13,065	7,282	5,783	2,939	1,499	[illegible]
Under $1.45	51,396	29,305	22,091	11,535	5,409	6,126	21,082	13,873	7,208	15,216	8,219	6,997	3,564	1,804	1,760
Under $1.50	61,582	34,995	26,586	12,531	5,860	6,671	24,301	16,298	8,002	20,228	10,526	9,702	4,521	2,310	2,211
Under $1.55	80,624	46,363	34,262	14,650	6,832	7,818	33,240	22,580	10,660	26,585	13,904	12,681	6,149	3,047	3,103
Under $1.60	91,714	52,485	39,230	15,718	7,372	8,346	39,585	26,632	12,953	29,180	14,938	14,242	7,232	3,543	3,689
Under $1.65	117,402	68,314	49,088	19,007	9,340	9,666	52,976	36,516	16,460	36,057	18,069	17,988	9,362	4,389	4,974
Under $1.70	134,012	78,755	55,256	20,453	10,050	10,403	63,168	43,989	19,179	39,366	19,473	19,893	11,025	5,244	5,781
Under $1.75	158,110	93,802	64,309	21,692	10,635	11,057	77,933	55,306	22,627	43,475	20,992	22,483	15,010	6,869	8,141
Under $1.80	191,902	113,306	78,596	26,806	13,222	13,584	96,527	67,603	28,924	50,507	24,170	26,337	18,061	8,311	9,751
Under $1.85	218,522	128,770	89,752	29,176	14,340	14,836	112,679	79,000	33,679	56,300	26,275	30,025	20,367	9,154	11,213
Under $1.90	248,938	146,212	102,725	31,957	15,780	16,178	130,500	91,359	39,141	62,405	28,827	33,577	24,076	10,247	13,829
Under $1.95	276,752	161,477	115,275	34,677	16,871	17,807	148,294	102,909	45,385	67,185	30,494	36,691	26,595	11,203	15,392
Under $2.00	305,464	177,772	127,692	37,787	18,761	19,027	166,036	114,291	51,745	72,339	32,511	39,827	29,302	12,209	17,093
Under $2.05	368,555	218,127	150,428	49,365	25,282	24,083	193,471	133,595	59,876	89,632	43,591	46,040	36,087	15,659	20,427
Under $2.10	398,887	234,709	164,178	52,605	26,957	25,648	210,580	144,580	66,001	96,334	46,318	50,016	39,368	16,854	22,514
Under $2.15	442,662	260,095	182,567	61,327	30,704	30,623	232,901	160,498	72,403	105,232	50,690	54,542	43,201	18,203	24,998
Under $2.20	476,812	278,638	198,173	67,078	33,583	33,495	250,349	171,615	78,734	111,735	53,240	58,496	47,649	20,200	27,449
Under $2.25	514,623	299,111	215,512	73,523	36,638	36,886	267,048	182,294	84,754	120,557	57,866	62,692	53,494	22,314	31,181
Under $2.30	562,507	328,039	234,468	81,013	40,583	40,430	290,812	199,115	91,698	130,478	63,356	67,122	60,203	24,985	35,218
Under $2.35	606,957	352,517	254,440	90,816	45,232	45,584	308,372	210,978	97,394	142,263	69,003	73,255	65,505	27,299	38,206
Under $2.40	648,072	375,155	272,916	98,079	48,786	49,293	325,474	222,391	103,083	150,804	73,849	76,955	73,715	30,129	43,586
Under $2.45	695,536	401,853	293,684	109,759	55,928	53,830	341,054	232,988	108,065	162,528	79,537	82,990	82,196	33,399	48,797
Under $2.50	732,490	422,186	310,304	116,428	59,022	57,406	357,192	243,621	113,571	170,148	83,265	86,884	88,721	36,278	52,443
Number of nonsupervisory employees	2,587,069	1,805,016	782,053	640,190	445,739	194,451	748,828	544,988	203,840	697,785	482,590	215,195	500,266	331,700	168,566
Total weekly payroll for nonsupervisory employees (thousands)	321,237	239,531	81,706	78,503	58,777	19,726	79,854	60,323	19,531	92,805	69,373	23,432	70,075	51,058	19,016
Average hourly earnings	$3.27	$3.43	$2.87	$3.41	$3.60	$2.95	$2.70	$2.75	$2.53	$3.52	$3.74	$3.01	$3.62	$3.91	$3.01

Table 1. Estimated number of nonsupervisory employees paid less than the minimum wage rates specified in the 1974 Amendments to the Fair Labor Standards Act and estimated cost of raising their wages to those rates on January 1, 1976 1/

Coverage status and scheduled minimum wage rate	Employees paid less than scheduled rate		Annual wage bill increase		Total number of employees	Projected annual wage bill
	Number (thousands)	Percent	Amount (millions)	Percent	(thousands)	(millions)
Total, all nonsupervisory employees subject to the minimum wage	3,877	6.9	$1,201	0.2	56,121	$484,077
Employees subject to the minimum wage prior to 1966 Amendments to $2.30	1,199	3.4	431	.1	35,677	337,770
Employees subject to the minimum wage as a result of 1966 Amendments	1,574	11.8	529	.6	13,378	88,213
Federal government to $2.30	35	5.7	11	.2	615	6,567
State and local government to $2.20	331	10.5	92	.5	3,140	20,146
Other private nonfarm employees to $2.20	1,126	12.4	398	.7	9,051	58,287
Farmworkers to $2.00	82	14.3	28	.9	572	3,213
Employees newly covered by 1974 Amendments	1,104	15.6	241	.4	7,066	58,094
Federal government to $2.20	-	-	-	-	1,689	17,472
State and local government to $2.20	90	2.3	33	.1	3,835	36,636
Domestic service to $2.20	923	72.4	161	6.3	1,274	2,552
Other private nonfarm employees to $2.20	85	35.0	45	3.4	243	1,339
Farmworkers to $2.00 2/	6	25.5	2	2.1	25	95

1/ Estimates are based on employment in September 1975 and earnings levels projected to January 1, 1976, assuming an annual increase of 8 percent. Dollar amounts are annualized rates as of January 1, 1976 with no allowance for perquisites. For tipped employees, earnings include cash wages plus an allowance of 50 percent of the applicable minimum wage for tips. Estimates exclude changes proposed for employees in Puerto Rico and the Virgin Islands.

2/ Farmworkers added to coverage by revision of section 3 (e).

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IN THE

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OCTOBER TERM, 1975

Nos. 74-878 and 74-879

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Appellants,

v.

HON. WILLIAM J. USERY, JR.
Secretary of Labor of the United States,
Appellee.

The State of CALIFORNIA,
Appellant,

v.

HON. WILLIAM J. USERY, JR.
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ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES AND ITS AFFILIATE ORGANIZATION THE NATIONAL ASSOCIATION OF COUNTY CIVIL ATTORNEYS AS AMICUS CURIAE

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STATEMENT OF INTEREST OF THE AMICUS AND IMPORTANCE OF THIS CASE TO COUNTIES: THE UNIQUE ISSUE PRESENTED IN THIS BRIEF

We here present a brief almost solely to one point: that the Fair Labor Standards Act[1] (hereafter the Act and FLSA) is unconstitutional under the necessary and proper clause of the Constitution of the United States. We believe it is the decisive point. We have reviewed the record and the briefs filed herein and no party or *amici* adequately address this point.

The National Association of Counties is composed of political subdivisions of states within Rule 42(4) of this Court and files this brief under said Rule. This brief is signed by their authorized law officers.

Never in 200 years has any Act of the federal Congress so greatly imperiled the fiscal integrity of Counties. This Act imposes new federal law, new federal court preemption of County functions, state law and state court jurisdiction, as well as imposing unique and costly regulations upon Counties. Counties cannot levy taxes, plan budgets, do improvements, fix wages or make any other expenditures of consequence without fear that the FLSA Amendments here attacked as unconstitutional will not, through retroactive application of controls, largely written for private business, hereafter impose costs and criminal penalties the County did not and cannot fix a tax and a budget for, or even pay for.

County integrity is beset with fiscal problems even now. If this uncertain Act is upheld, it should be accompanied by a decision of this Court that there be an immediate federal appropriation paying its millions in

[1] c.676, 52 Stat. 1060, 29 U.S.C. §201 *et seq.* (1970), *as amended.*

costs. Counties do not and cannot get the tax money to pay for the Act's requirements, and unnecessary expenditures of millions in useless costs can only result in cutting County services, by cutting personnel off the County payrolls.

The burden is on the government to produce evidence of a finding by the Congress of major impact on commerce by County wage payments in order to validate the Act. We cannot find any substantial finding that Congress actually made a finding that its application to County employees would promote some congressional policy objective with regard to interstate commerce. One looks in vain for indications that Congress made any such finding. The discussion and debate recorded in the Congressional Record concerning the bill, contain minuscule references to an unidentified 95,000 out of 11,400,000 state and local employees who may have then been paid below the minimum wage. Appellants' briefs challenge this claim, but even if true this is a mighty thin basis for such a major shift to the federal government of power over 85% of the budgets of Counties. We do not even know whether they are County employees. Are these unidentified 95,000 so placed that they can block or stop or affect commerce substantially? One is led to doubt such a conclusion.

We, therefore, urge that this presentation on this question of great public importance which goes to the very future existence of Counties as meaningful government bodies be given consideration by this Court. This Court is here deciding whether there is to be a future for Counties in our nation or whether the national Labor Department and the federal courts are going to take them over and run them. On the subject of control, surely all must concede that ultimate federal control of

85% of each County's budget is control of that County.

If this Court holds that the federal government can order states, cities and Counties to spend their people's tax money to carry out the federal purposes of this Act—purposes we cannot fathom and which are of no benefit and great damage to Counties—your decision will control and will be obeyed. We believe, however, that this Court should be advised that obedience will either cause increased taxes or cut out County jobs and services. The Clean Air Amendments of 1970, 42 U.S.C. § 1957(h) have recently been seriously questioned on constitutional grounds because they force states and Counties to pay out state and County tax money for a federal requirement. See *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975); *Arizona v. EPA*, 521 F.2d 825 (9th Cir. 1975); *Maryland v. EPA*, 8 E.R.C. 1105 (4th Cir. Sept. 1, 1975); *District of Columbia v. Train* ____ U.S. App. D.C. ____, ____ F.2d ____ (Oct. 28, 1975).

On top of its enormous cost, and adding to that cost enormously is the fact that, under this Act, federal officials, federal administrative judges and the federal courts replace state officials and courts. It is awkward and costly for Counties to deal with these federal agencies and the federal courts on matters totally local in character and which up to now have been handled reasonably and satisfactorily to all concerned: *i.e.* Counties, their residents and their employees.

SUMMARY OF ARGUMENT

A proper analysis of the necessary and proper clause as the congressional power supporting the 1974 Labor Act Amendments as applied to states and cities, has not been ~~been~~ made in this case. Certainly it was not made by the Congress, which is required to justify these Amendments substantially, and cannot rely on this Court to surmise a basis for them.

Under the necessary and proper clause, the Congress was required to show that working conditions among state and local government employees are so bad as to present the substantial possibility of strikes drastically interrupting the flow of goods and services in interstate commerce; Congress further was required to show that the Amendments would diminish the labor unrest and therefore protect and promote commerce. This is the basis for the original 1938 Labor Act and quite permissible a showing under the necessary and proper clause (Other bases, such as Congress' desire to eliminate competition in the sale of goods and services *in interstate markets*, coupled with a finding that substandard wages is an unfair competitive device, cannot, by the very nature of government, be here applicable).

Rather than such a telic showing, the Congress here cites purchases of goods by states and cities, the welfare system and a *pot pourri* of factors which do not in any way support these Labor Act Amendments.

Of the required showing of state and local government employees who strike over wages which the Act will improve, the Congress mentions the existence of 95,000 out of 11,400,000 employees and does not show that any of them strike. Considering the federalism interest involved in this case, this is a scandalously weak showing. No case of this Court will support upholding the 1974 Amendments on such a weak reed.

ARGUMENT

I.

THE NECESSARY AND PROPER CLAUSE ISSUES HAVE NOT BEEN PRESENTED IN THIS CASE.

At the outset, it is essential to distinguish clearly between issues under the commerce clause, on the one hand, and issues under the necessary and proper clause of the Constitution on the other hand. There is a great tendency among lawyers, and in the cases, to speak imprecisely and to confuse these distinct issues. For example, it is commonplace to speak of the commerce power reaching activities that "affect" interstate commerce. Loose talk about activities that "affect commerce" is responsible for a great deal of confusion and sloppy analysis of federalism issues. In reality, *there is no commerce clause principle that empowers Congress to regulate non-interstate commerce activities because they affect interstate commerce.* Statements suggesting that there is such a principle (and such statements abound) are imprecise and sloppy misstatements of a *different* principle, based upon a *different* clause, and *not* based on the commerce clause at all.

> The *commerce clause* does *not* empower Congress to regulate non-interstate commerce activities which affect interstate commerce.
>
> The *necessary and proper clause*, however, frequently does.

To be sure, even the courts themselves have frequently failed to be precise in expression, and have

written in commerce clause language at times when the question at hand, correctly stated, was a necessary and proper clause question. The cases are full of careless shorthand statements that Congress can regulate this or that intrastate activity "under the commerce clause," because of its effect on interstate commerce.[2] If the importance of greater precision of expression were perceived, those statements would instead have indicated that Congress could regulate the intrastate activity in question under the necessary and proper clause, because of the relationship between that intrastate activity and some desired interstate commerce policy objective. In fact, at times the importance of greater precision of expression *has* been perceived, and when it has been, this Court has taken care to separate the commerce clause and necessary and proper clause issues. Illustrative cases are cited on page 41 of Engdahl, *Constitutional Power: Federal and State In A Nutshell* (1974).

In the case now at bar, the bulk of the state employees to whom the new provisions apply are not engaged in interstate commerce. Neither were the state and local school and hospital employees who were involved in *Maryland v. Wirtz*, 392 U.S. 183. Neither was the "loan shark" who was involved in *Perez v. United States*, 402 U.S. 146. The loan shark's business activity could be reached by Congress, however, because the elimination of that local activity was viewed as a means to effectuate the congressional policy objective of unencumbered inter-

[2] Because the necessary and proper clause requires another power as its object, and is thus always auxiliary to another power, it is not entirely inaccurate to say that a measure sustained by the necessary and proper clause with reference to the commerce clause is valid under the latter. In *Wirtz*, for example, Justice Harlan wrote, "This Court has examined and will continue to examine federal statutes to determine whether there is a rational basis [a necessary and proper clause test] for regarding them [in their effect] as regulations of commerce among the States." 392 U.S. 183, 192.

state commerce. Although Mr. Justice Douglas in the *Perez* majority opinion called this an exercise of the commerce power, it was in reality an exercise of the necessary and proper power. Similarly, in *Maryland v. Wirtz, supra,* the state and local school and hospital employees could be reached because the regulation of them in the way provided for by Congress was a means to a commerce clause end–a necessary and proper method for producing the uninterrupted flow of goods across state lines. *Wirtz,* both as to the state activities issue and as to the enterprise concept as such, turned not on the commerce clause, but rather on the necessary and proper clause. Similarly, in the case at bar, in spite of the obvious fact that the activities of the state and local employees are not themselves interstate commerce these employees could still be reached if the requirements, not of the commerce clause, but rather of the necessary and proper clause, were met.

This case, just like *Maryland v. Wirtz, supra,* is fundamentally a necessary and proper clause case, *not* a commerce clause case. Recognizing that fact is extremely important, because without that distinction firmly in mind one too easily will keep slipping back into fruitless political grumblings about "the expanding commerce power" and the "death of federalism," and may fail to perceive with sufficient clarity the crucial practical and enforcible necessary and proper clause principles that govern this case.

II.

THE KEY TO THIS CASE IS THE NECESSARY AND PROPER CLAUSE, NOT THE COMMERCE CLAUSE.

The key to this case is the necessary and proper clause and the principles–some of them well-established and some of them only now emerging–which the decisions of this Court support in relation to that clause. See Engdahl, *supra* at §§ 2.01-2.03 where the classic misconceptions concerning the meaning and operation of this clause are explained.

Having clarified the misconceptions, let us look at some enforcible and very practical limits on the necessary and proper power, which are well supported by the cases, have not been damaged by *Wirtz* or other cases, and rather clearly have been transgressed by the legislation now challenged.

The enforcible limits which are relevant are three. In order to uphold the application of FLSA provisions to state and local government employees (not engaged in interstate commerce) as an exercise of the necessary and proper clause power, this Court must find that:

> (a) Congress has found that the application of FLSA to such employees will promote some policy objective that Congress has with regard to interstate commerce (as distinguished, *e.g.*, from a policy objective with regard to standard of living);
>
> (b) The congressional finding that the regulation will promote such interstate commerce policy objective, is a finding that has a rational basis; and
>
> (c) The impact which Congress has rationally found that the FLSA coverage of state and local employees will have upon that interstate commerce policy objective, is a "substantial" impact.

III.

TO SATISFY THE NECESSARY AND PROPER CLAUSE, THE COURT MUST FIND THAT CONGRESS HAS FOUND THAT THE APPLICATION OF FLSA TO STATE AND LOCAL GOVERNMENT EMPLOYEES WILL PROMOTE SOME CONGRESSIONAL POLICY OBJECTIVE WITH REGARD TO INTERSTATE COMMERCE.

It used to be, earlier in this century, that the Court, instead of leaving this determination to be made by Congress, would take it upon itself to determine whether a regulation of some non-interstate commerce matter by Congress would promote some interstate commerce policy objective and thus be valid under the necessary and proper clause. An illustration is *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330; another is *Adair v. United States*, 208 U.S. 161, 176-179. Those cases were aberrations, however, from the main-line of decisions, continuing to the present without any prospect of change, which hold that this determination is for Congress to make, *e.g.*, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, at 423; *Stafford v. Wallace*, 258 U.S. 495, at 521; *Chicago Board of Trade v. Olsen*, 262 U.S. 1; *Katzenbach v. McClung*, 379 U.S. 294.

But while the determination that the regulation of the non-interstate commerce activity (*i.e.*, application of FLSA to state and local government employees) will promote a commerce policy objective is a determination for Congress and not for the Court to make, it is necessary for this Court, in ruling on the validity of the measure, to ascertain whether or not Congress *has* made that determination. Now, there is no requirement that Congress express its finding on this crucial point in any

particular way. Sometimes the finding is articulated in a preamble or in the text of an act. Sometimes it is expressed in the text of significant committee reports. Sometimes the finding is inferred from other materials of legislative history, or from the bulk of hearing testimony or other information known by the Court to have been before the Congress, and reasonably assumed to have influenced Congress' judgment on the point. As the Court said in *Maryland v. Wirtz*, the Court does not need to be "concerned with the manner in which Congress reached its factual conclusions" about whether the regulation would promote an interstate commerce policy end. 392 U.S. at 190 n. 13. Neither does the Court have to be concerned about just how Congress expresses those conclusions once it reaches them. However, it is essential that this Court be able to ascertain somehow, from some sufficient indication, that Congress actually has reached the conclusion that the regulation will promote the commerce policy objective.

In case after case after case, where the validity of federal enactments has turned on the necessary and proper clause, this Court has gone to considerable lengths to recite indications from the legislative history or from the language of the act to show that Congress actually did find that the regulation of the local activity in question would promote some congressionally desired commerce policy objective. *E.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 308-15; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 246, 252-53, 265-66; *Katzenbach v. McClung*, 379 U.S. 294, 299-301; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43 n. 8; *Chicago Board of Trade v. Olsen*, 262 U.S. 1, 11-15, 37-38; *Stafford v. Wallace*, 258 U.S. 495, 499-502; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402, 423-24.

Much of the cynical discussion about federal power among lawyers (and particularly among "sophisticated" constitutional law professors) today proceeds in ignorance of the significance of this requirement that *Congress have found* the required relationship between its regulation of a local activity and the promotion of its interstate commerce policy objective, in order for the regulation to be upheld under the necessary and proper clause. Men and women of imagination could put together a string of means-to-end connections sufficient to tie almost any and every conceivable local activity to some hypothesized objective within the scope of the federal power over interstate commerce. But the entertaining imaginings of cynics about the bankruptcy of commerce clause doctrine, are not the kind of inquiries that Supreme Court Justices make when they consider a necessary and proper clause issue. The issue is not, "*can we imagine* that this regulation might promote a commerce policy objective," but rather, "*did Congress find* that it does."

There has not been a modern case yet decided in which, after inquiry, this Court has been unable to discover such a congressional finding where it was required. Consequently, we do not have in the cases an explicit holding that the failure of Congress to find the necessary means-to-end relation to exist will result in the invalidation of its regulation of the local activity under the necessary and proper clause. However, there are strong arguments that such invalidation would have to result if the necessary congressional finding were not found. And, as will be explained, it may well be that the case now at bar will be the first in which this Court will be unable to say that Congress made the finding required.

A. Congress Has Not Found That Application of The FLSA To Counties Will Promote A Congressional Policy Toward Commerce.

The arguments for invalidity—where Congress has not made the necessary finding are as follows:

First, the cases cited above, in which the Court has elaborately recited the findings of Congress, contrast sharply with cases like *McGowan v. Maryland*, 366 U.S. 420; *Williamson v. Lee Optical Co.*, 348 U.S. 483; and *Railway Express Agency v. New York*, 366 U.S. 106, which involve a comparable means-to-end test for upholding state regulations of economic interests under the Fourteenth Amendment. In those Fourteenth Amendment cases, the Court has not required actual findings by the legislatures that the acts being challenged promote some legitimate state end; instead, the Court has indulged in speculation and surmise to discover some conceivable such redeeming relation. This contrast, arguably, reflects the judgment that expansion of federal power is a greater risk to our traditions of limited government and enumerated powers than exertion of state power, and is thus to be reviewed much more critically by the Courts.

Second, for this Court to speculate so in the necessary and proper clause context, rather than insisting that a finding have been made by Congress, would be for the Court to take unto itself the function of determining whether the requisite relationship exists; and that would be to revert to the discredited approach of *Alton Railroad* and *Adair, supra*, in violation of the cases like *McClung, Chicago Board of Trade, Stafford*, and *McCulloch, supra*, which hold that this is a function for Congress.

Third, given the doctrine of enumerated powers, and the emphasis which the admittedly truistic and tautological Tenth Amendment gives to that doctrine, it would be quite anomalous to uphold federal regulation of a strictly local activity on the basis of the necessary and proper clause without some kind of showing, from some probative indications in the language or history of the legislation, that a finding that the regulation would conduce to some enumerated power objective was actually made. Where a sufficient relation to a commerce clause objective is shown, federal power can extend deep into what otherwise would be the states' own policy domain, with preemptive effect. This Court has always been cautious about approving such alterations in the balance of federalism. In a comparable situation recently the Court said:

> "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. . . . [T]he requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."

United States v. Bass, 404 U.S. 336, at 349. *See also Younger v. Harris*, 401 U.S. 37.

Fourth, requiring that Congress confront the issue and actually make a finding that the particular regulation being imposed on some local activity promotes some interstate commerce policy (whether or not that finding is anywhere explicitly articulated in print), is necessary in order to assure that the deliberative political process is made to work. Ultimately, most constitutional doctrines operate not as absolute and insurmountable barriers to a course of action, but rather as buffers to slow down precipitous action, to require contravening considerations

to be weighed, to provide points of contest to focus political debate, and generally to put the deliberative process of a healthy democracy through its paces. Lots of congressmen might agree that state and local employees should have shorter work weeks and better pay. Propose that this ideal be achieved through federal rather than state legislation, and the support probably will dwindle a bit. Propose that the standards be the same as for private industry, and the support may fall off a bit more. Explain that the regulation is needed in order to prevent strikes by disgruntled public employees, and you may win back a few supporters who don't like strikes, but lose a few who believe the risk of such strikes is minor or can be otherwise handled. Add the requirement that Congress must find that such strikes, should they occur, would disrupt interstate commerce, and you may pick up a few guardians of industry, but lose a few others who just aren't convinced by the evidence that such disruption would occur. Requiring some indication that Congress has considered the matter and made the required finding gives some assurance that this process of discussion and deliberation has occurred. Failing to enforce such a requirement, on the other hand, short-circuits the process and heightens the chances that discussion will go little beyond the political desirability of shorter hours and better pay. The reports quoted by appellants in their briefs clearly prove that Congress was somewhat deceived and misled by misrepresentations as to the impact of the new provisions upon state and local governments and underscore the desirability of insuring full deliberation.

We therefore urge that the amendments applying FLSA to state and local government employees transgress this first enforcible limit of the necessary and proper clause.

IV.

THE BURDEN IS ON THE GOVERNMENT TO VALIDATE THE ACT BY PRODUCING EVIDENCE THAT WAGE PAYMENTS TO COUNTY EMPLOYEES (BE THEY THE UNKNOWN 95,000 OR THE 12 MILLION TOTAL STATE AND LOCAL) ADVERSELY IMPACT COMMERCE.

The House Report, H. Rep. No. 913, 93d Cong., 2d Sess. (1974) contains no discussion whatsoever of the impact on County employees, or even on state and local employees as to coverage under interstate commerce. It does, however, refer to a 1970 study of the feasibility of covering state and local employees, which was submitted to Congress by the Department of Labor. The famous 95,000 unidentified state and local employees out of 11,400,000 paid below the minimum wage are mentioned there. It is absurd that Congress would focus on these nameless 95,000 when there are literally millions of exempt employees in over 50 broad categories of exemptions under the Act. (See attached Appendix). A most interesting exemption is that of Act § 7(f) excusing violations of the Act made under collectively bargained contracts, thus forcing unionization on entities which would retain flexible scheduling practices. The most interesting exemption from the entire Act is § 3(d)'s exclusion of labor unions and their officers and agents. That study does not contain anything from which Congress might have concluded that by thus extending coverage of the Act, it would promote some commerce policy end. In fact the Appellants' brief at pages 19-21 quotes the Statement of the then Secretary of Labor, opposing the Act's Amendments as an undue and unnecessary intrusion upon state sovereignty.

The House Conference Report, H. Conf. Rep. No. 953, 93d Cong., 2d Sess. (1974), contains no reference at all to the entire matter of County or of state and local government employee coverage. The Senate Report, S. Rep. No. 690, 93d Cong., 2d Sess. (1974), is interesting. At page 24 of the Senate Report appears the following paragraph:

> "The Committee believes that there is no doubt that the activities of public sector employers affect interstate commerce and therefore that the Congress may regulate them pursuant to its power to regulate interstate commerce. Without question, the activities of government at all levels affect commerce. Governments purchase goods and services on the open market, they collect taxes and spend money for a variety of purposes. In addition, the salaries they pay their employees have an impact both on local economies and on the economy of the nation as a whole. The Committee finds that the volume of wages paid to government employees and the activities and magnitude of all levels of government have an effect on commerce as well."

However, first, § 3(i) exempts "ultimate consumers" from the Act. Second, this is simply not adequate as a finding to satisfy the requirement under the necessary and proper clause. What is required is not a finding that the activity being regulated affects interstate commerce, but rather a finding that the particular regulation being imposed on that activity will promote some particular objective that Congress has set for itself with regard to interstate commerce. *See* Engdahl, *Constitutional Power, supra*, § 5.04.

In contrast to the statements above quoted from the Senate Report, it might be helpful to indicate what might have been a sufficient congressional finding (if it had been made). It might have been found that working conditions among state and local government employees are so bad on such a widespread national scale that the

employees are restless and might strike in such large numbers that the flow of goods and services interstate would be drastically interrupted, and that by federal regulation of state and local employees, the new federal working conditions would diminish the unrest and thus promote Congress' objective of having interstate commerce proceed without interruption. Or, it might be found that cut-rate wage conditions in state and local government employment create market conditions making for a kind of competition for goods and services in the interstate market that Congress has decided it wants to eliminate from interstate commerce. If these sound familiar it is of course true that those are the kind of findings that *were* made by Congress to base the original FLSA upon the necessary and proper clause as to private business. But there are no congressional findings like this to lend support to the extension of coverage to state and local government employees under the Amendments here attacked.

The dim references to some 95,000 out of nearly 12 million state and local employees with no identification as to who and where these employees are is a paltry basis for such a huge shift of government power. The challengers of the Act in *Maryland v. Wirtz* made a major point of the claim that there were not sufficient findings made by Congress to support the 1961 "enterprise concept" amendment of the FLSA under the necessary and proper clause. The point did not seem to impress the majority, for a footnote says:

> "The original Act stated Congress' findings and purposes as of 1938. Subsequent extensions of coverage were *presumably* based on similar findings and purposes with respect to areas newly covered." 392 U.S. 183, 190 n. 13 (emphasis added).

That may be an indulgent presumption, although it is a far more reasonable presumption with regard to

extension of a comprehensive, long continued, and continually reviewed regulation of commercial enterprise than it would be in the case of a wholly new enactment or a radically new departure in regulation. What is notable, however, is that this "presumption" when indulged in 392 U.S. 183, 190 n. 13, pertained to the "enterprise concept" amendment, and no such presumption was indulged when the Court came to that part of the opinion dealing with extension to cover maintenance employees of public schools and hospitals, while noting the enormous elimination of thousands of highly paid professionals. Instead, the Court in its footnote 25 (392 U.S. at 195) referred to a Labor Department study, said to be available to Congress in 1960 concerning work stoppages involving government employees, which the Court said documents work stoppages (and consequent disruptions of the interstate flow of goods and services) in public schools and hospitals.

V.

TO SATISFY THE NECESSARY AND PROPER CLAUSE THE COURT MUST FIND THAT THE FINDING THAT CONGRESS HAS MADE CONCERNING THE PROMOTION OF AN INTERSTATE COMMERCE PURPOSE IS A FINDING THAT HAS A RATIONAL BASIS.

The District Court's finding that little or no interstate commerce competition is created by states and local governments, even less than in *Wirtz*, caused that Court to wonder whether this Supreme Court would interpret *Wirtz* so broadly as applied in this Act to encompass the whole of state and local government and the hundreds of their non-commerce services not affecting commerce.

A. What does rational basis mean?

First, it is to be noticed that the requirement is *not* that there be some rational basis for doing what the Act does, or for regulating what the Act regulates. To ask whether it is "rational" for the federal government to regulate the acts of states in fixing employees' wages, or whether there is a "rational basis" for doing so, is no different from what the courts did some fifty years ago under the guise of "substantive due process," arrogating to themselves the power to declare that one or another substantive policy chosen by the legislature was "unreasonable" and therefore void. That old *Lochner v. New York*, 198 U.S. 45, doctrine went out long ago with *Nebbia v. New York*, 291 U.S. 502, and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379. The "rational basis" test has nothing to do with that. We do not believe this Court is about to get back into the business of declaring legislative policy choices "irrational" again.

Rather, the "rational basis" requirement relates to Congress' *finding* of a *relationship*, the relationship between a particular regulation of some local activity, and the attainment of some interstate commerce policy objective, eradicating some evil affecting or impeding commerce.

Strictly speaking, the rational basis question arises only after it is determined that Congress has in fact found such a relationship to exist. However, we presume to cast the question in terms of whether there is any rational basis on which Congress did find, or could have found, that the regulation in question, although a regulation of a local activity and not a regulation of something in interstate commerce, promotes a congressional policy objective with regard to interstate commerce.

"Rational basis" is unquestionably a lower standard than "preponderance of the evidence," or even than "substantial evidence." On the other hand, one can certainly with reason contend that it is more than a "scintilla" rule. At least it must mean consistency with the expectations of probability gleaned from common experience, and it may well carry a connotation of some significant creditable evidence.

It is an easy error, but a serious and demonstrable error, to mistake the requirement of a "rational basis" for no effective requirement at all. *It is true that there has not been a case since 1937 in which a majority of the Supreme Court, in applying the necessary and proper clause to commercial regulations, has held a federal statute to fail the rational basis test.*

Has the Court abdicated the rational basis test for commerce clause legislation? If we believed that, we would not file this brief! However, there are matters *other* than commerce to which the necessary and proper clause applies. Furthermore, there are issues other than those under the necessary and proper clause as to which controlling effect will be given to a legislative judgment only if it has a "rational basis." This Court's reasoning on these other issues gives some insight into the notion of "rational basis," which can be generalized and applied here. In some cases, legislation *has been* invalidated because the legislative findings on the issue crucial to its validity have failed to pass the rational basis test. *E.g.*, *United States ex rel. Toth v. Quarles*, 350 U.S. 11; *Morey v. Doud*, 354 U.S. 457. In addition, the opinions of the several Justices in other cases contain passages that help to clarify what meaningful limits the rational basis concept entails.

One such opinion is found in *Quarles, supra,* a case in which the Supreme Court invalidated a statute which provided that an ex-serviceman could be tried by court-martial for an act allegedly committed during his term of military service. The dissent in that case detailed the reasoning by which Congress had apparently concluded that the statute was necessary and proper to the enumerated power of controlling the armed forces, 350 U.S. at 27-29; but the majority swept that reasoning aside, saying that "[i]t is impossible to think that the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed" in the absence of the regulations. 350 U.S. at 22.

Another such case is *Morey v. Doud, supra,* which, unlike *Quarles,* cannot be avoided with the assertion that something more stringent than a "rational basis" test was in fact being applied because favored rights were involved. In *Doud* the Court applied a rational basis test to a state scheme of commerce regulation, and held the scheme invalid for lack of any rational basis on which a means-to-end relationship to any governmental interest could be found.

Another illustration is provided by the companion cases of *Perez v. Brownell*, 356 U.S. 44, and *Trop v. Dulles*, 356 U.S. 86. In *Perez* this Court upheld one application of the Nationality Act of 1940, while in *Trop* it found another application of the same Act unconstitutional. Some of the Justices maintained in both cases that involuntary divestiture of American citizenship was in all events a violation of a specific constitutional guaranty, *i.e.*, Mr. Chief Justice Warren, and Mr. Justice Black, and Mr. Justice Douglas. A majority of the Court disagreed with that thesis, but conceded that such divestiture could be sustained under the necessary and proper clause only

if rationally found to be a means of effectuating some federal government power. Several of the Justices found and articulated what to them seemed a sufficiently rational basis in both cases: *see* 356 U.S. at 60-62, and 356 U.S. 121-22 (Justices Frankfurter, Burton, Clark, and Harlan). The only member of the Court to vote with the majority in both cases was Mr. Justice Brennan. He agreed that the presence or absence of a rational basis for finding a means-to-end relation was decisive in both cases, and he explained at some length why he found that requirement to have been satisfied in the one case but not in the other, 356 U.S. at 105-14.

There are more illustrations, too. Justice Harlan discussed the rational basis requirement in connection with various applications of one particular federal law, in his opinion concurring in part and dissenting in part in *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 257-58. Three years earlier, in *Reid v. Covert,* 354 U.S. 1, Mr. Justice Harlan and Mr. Justice Frankfurter had disagreed over whether the rational basis test was satisfied by another regulation under the necessary and proper clause: *cf.* 354 U.S. at 71-73, 77-78 (Harlan, J., concurring) *with* 354 U.S. at 46-47 (Frankfurter, J., concurring).

Another kind of case also gives some insight into the meaning of "rational basis." Occasionally, when confronted with a federal statute that appears very difficult, if at all possible, to justify on necessary and proper clause grounds, the Supreme Court has escaped the onus of invalidating the act by instead giving it an artificially narrowed construction. *E.g., United States v. Five Gambling Devices,* 346 U.S. 441, at 447-49, 452; *Tot v. United States,* 319 U.S. 463, at 467-68, 472. Such artificial construction gives rise to the strong suspicion

that the act would have been held to lack a rationally based means-to-end relationship to sustain it under the necessary and proper clause if it had been more candidly construed.

Neglect of these opinions, which illustrate the real force that the rational basis test can have, has led many lawyers to become cynical and careless about the concept of rational basis. There have been instances in which statutes straining the limits of constitutional power have been allowed to go by without challenge, even though it seems very likely that a challenge on the rational basis ground, had it been made, would have been successful. *E.g., Phillips v. Martin Marietta Corp.*, 400 U.S. 542.

Maryland v. Wirtz itself implies a "some significant creditable evidence" and "common experience" concept of rational basis. There the Court said, in the text accompanying footnote 25:

> "Strikes and work stoppages involving employees of schools and hospitals, events which unfortunately are not infrequent [citing the Labor Department study for evidence], obviously [based on the expectations of probability gleaned from common experience] interrupt and burden this flow of goods across state lines [contrary to Congress' free-flow commerce policy]. It is therefore clear that a 'rational basis' exists. . . ."

Now, surely it is not difficult to distinguish, in terms of available evidence and common experience, between labor conditions in public schools and hospitals, on the one hand, and the entire non-supervisory state and local government workforces, who render an estimated 500 separate public services on the other hand, with respect to their relationship to the flow of goods between states. If there is any evidence or experience to lend color of

rationality to a finding that wholesale federal regulation of state and local government employees services thus controlling their wages and hours will promote the free flow of goods across state lines, or eliminate some undesirable kind of evil competition in interstate commerce, that evidence and experience has been concealed quite as well as the congressional finding itself.

VI.

TO SATISFY THE NECESSARY AND PROPER CLAUSE, THE COURT MUST FIND THAT THE IMPACT THAT THE FLSA COVERAGE OF STATE AND LOCAL EMPLOYEES WILL HAVE UPON THE INTERSTATE COMMERCE POLICY OBJECTIVE IS A "SUBSTANTIAL" IMPACT.

We hope to avoid the revival of any form of "direct" effect requirement! That would be to return a great stride toward the discredited old rule of *Schechter Poultry Corp. v. United States*, 295 U.S. 495 and *Carter v. Carter Coal Co.*, 298 U.S. 238, which we escaped none too soon in 1937 when *NLRB v. Jones & Laughlin*, 301 U.S. 1, and a few years later *United States v. Darby*, 312 U.S. 100, brought us back to the historic old rule of *McCulloch v. Maryland, supra.* However, *Jones & Laughlin*, 301 U.S. 1, at 37, and also *United States v. Darby*, 312 U.S. 100, at 119-120, do declare that in order to satisfy the necessary and proper clause the relationship between the particular regulation of the local activity and the interstate commerce objective that it purportedly promotes must be "substantial." Of course, "substantial" is not a litmus paper criterion; but it is not a meaningless or insignificant requirement, in spite of the fact that no

modern case (at least until this one) can be pointed to in which even a district court has found the relationship to a commerce objective to be "insubstantial." Here the District Court did so find as a fact. While admittedly repetitious, we must refer again to the fact that Mr. Justice Harlan was indeed very much aware that the power of Congress does have limits. He wrote in footnote 27:

> "Neither here [in *Wirtz*] nor in *Wickard* [*v. Filburn*] has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state . . . activities."

Then he repeated the requirement of "substantial relation." Since that time, at least one of the Justices of this Court has cited a failure to meet the "substantiality" requirement, to his satisfaction, as a reason why he would invalidate an enactment even though it met the other requirements of the necessary and proper clause. *Perez v. United States*, 402 U.S. 146, 157 (Stewart, J., dissenting).

The Court's willingness to infer from the availability of that data that Congress did make such a finding does indicate that Congress *did* make the relevant finding. There is nothing even comparable to that to indicate that Congress made any finding sufficient to sustain under the necessary and proper clause the latest amendments, now being challenged.

If there were any indication that such a finding had been made, then the next question would be whether the finding had a rational basis. If no sufficient finding were made, however, the rational basis question should not even be reached. The provisions being challenged are invalid because they do not even satisfy the first requisite of the necessary and proper clause: Congress did not find

that the application of FLSA to state and local government employees would promote any congressional interstate commerce policy objective of any kind at any time.

Yet, we repeat the claim of impact here is on 95,000 out of 11,400,000 and to this day the 95,000 remain unidentified, unlocated, and the impact on them is unknown. It is reasonable to conclude their slight impact is so insubstantial as to raise the question: How could there possibly be a rational basis for Congress to reach out and embody the whole of state and local governments under this Act?

Even if the Court were to find that Congress in its nebulous, unclear report has found that this extension of FLSA coverage will promote free flow of goods or prevent some undesirable kind of competition in interstate commerce due to unidentified low paid state or local employees and even if the Court finds that there is a sufficient rational basis to support that congressional finding of relationship, still the impact that the wages and hours of policemen, firemen, and other state and local government employees as a whole might have on such flow of goods or competition is certainly not "demonstrably substantial," as Justice Stewart would have required in *Perez*. When that relatively insubstantial impact is compared with the enormous effects already shown in the brief of Appellants which the Act will have upon state and local governments, we have the perfect instance of what footnote 27 in *Wirtz* referred to as the use of "a relatively trivial impact on commerce as an excuse for broad general regulation of state . . . activities." Remember, what is important is not whether the activities of state and local governments have a substantial or trivial impact on interstate commerce, but rather, whether the regulation of these government employees' wages and

hours will have a substantial or trivial impact upon disruptions of, or undesirable competition in, interstate commerce.

Mr. Justice Harlan was absolutely right: Not in *Wirtz*, nor in any other case, has the Supreme Court ever countenanced any such thing.

VII.

THE INTERGOVERNMENTAL IMMUNITIES ISSUE

The distinction here is between regulation of the state when it does the same sorts of things that private persons may do, on the one hand, and regulation of the state when it does those things that are unique to states and are inherent in being a government, on the other hand. A recent case making this point is *Bradley v. Saxbe*, 388 F. Supp. 53 (D.D.C. 1974), (appeal noted but withdrawn). In *Maryland v. Wirtz*, the Court pointed out that there was nothing uniquely state or sovereign about running a school or a hospital. These are functions that private entities perform, too. It is not that they are "proprietary" rather than "governmental." Rather, it is that those activities are not, to adopt Mr. Justice Frankfurter's phrase in *New York v. United States*, 326 U.S. 572, "uniquely capable of being performed only by a state." In contrast, many of the activities performed by employees reached under the new FLSA amendments *are* "uniquely capable of being performed only by a state."

All the Court held in *Wirtz* was that "If a state is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private

persons, the State too may be forced to conform its activities to federal regulation," 393 U.S. at 197. And the Court simply refused to "carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States for the benefit of their citizens."

The new extension of the FLSA to cover all non-supervisory state and local government employees, including those in state activities that have no counterpart in the private business world, has no support in the *Wirtz* opinion, and in fact is quite inconsistent not only with the Court's language in that case but also with the reasoning of the earlier cases. Mr. Justice Harlan understood perfectly well what he was writing for the Court; and he would have ruled in favor of the states, cities and Counties in the case at bar on the basis of the language quoted. There is no other reasonable interpretation of his words.

CONCLUSION

In enacting Pub. L. No. 93-256 Congress did not meet its burden under the necessary and proper clause of demonstrating how the regulation of state, County and city government wages, hours and working conditions would substantially promote a congressional policy objective with regard to interstate commerce. The "findings" which Congress arrived at do not carry this burden and lack any rational basis. Appellee has been unable to meet and carry this burden in this case. Therefore, since the Act does not meet the Constitutional criteria under the necessary and proper clause, it must be declared unconstitutional. As the Congress' burden was to make specific findings which cannot be supplied by a Court, the decision of the District Court below should be

reversed with directions to grant the declaratory and permanent injunctive relief prayed.

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APPENDIX

STATUTORY EXEMPTIONS TO THE FAIR LABOR STANDARDS ACT

I. Exempt under definition of "employee":

§ 3(e)(2)(A): Certain federal military, legislative and judicial employees;

§ 3(e)(2)(C): Certain state and local government elected or appointed officials.

II. Exempt under definition of "enterprise":

§ 3(s): Certain family operated enterprises.

III. Partially exempt from maximum hours (§ 7) provision:

§ 7(f): Certain employees working pursuant to a collectively bargained or individual contract;

§ 7(g): Certain employees working pursuant to certain types of agreements;

§ 7(i): Certain retail and service establishment employees;

§ 7(j): Certain hospital employees;

§ 7(k): Certain police and fire employees;

§ 7(m): Certain tobacco industry employees;

§ 7(n): Certain transit employees.

IV. Exempt from minimum wage (§ 6) and maximum hours (§ 7) provisions:

§ 13(a)(1): Certain executive, administrative and professional employees;

§ 13(a)(2): Certain laundry, cleaning, school and hospital employees;

§ 13(a)(3): Certain amusement and recreational establishment employees;

§ 13(a)(4): Certain other employees exempt under § 13(a)(2);

§ 13(a)(5): Certain fishermen;

§ 13(a)(6): Certain agricultural workers;

§ 13(a)(7): Certain employees exempted by order of the Secretary of Labor;

§ 13(a)(8): Certain newspaper employees;

§ 13(a)(10): Certain switchboard operators;

§ 13(a)(12): Any seaman serving on a non-American vessel;

§ 13(a)(15): Certain domestic employees.

V. Exempt from maximum hours (§ 7) provisions:

§ 13(b)(1): Certain employees subject to § 204 of the Motor Carrier Act of 1935;

§ 13(b)(2): Certain rail common carrier employees subject to Part I of the Interstate Commerce Act;

§ 13(b)(3): Any employee of an air carrier subject to Title II of the Railway Labor Act;

§ 13(b)(4): Certain employees handling perishable foods;

§ 13(b)(5): Outside buyers in the dairy industry;

§ 13(b)(6): Any seaman;

§ 13(b)(7): Certain transit employees;

§ 13(b)(8): Certain hotel and motel employees;

§ 13(b)(9): Certain radio and television announcers and other employees;

§ 13(b)(10)(A): Certain automobile, truck, and farm implement salesmen and other employees;

§ 13(b)(10)(B): Certain trailer, boat, and aircraft salesmen;

§ 13(b)(11): Certain deliverymen;

§ 13(b)(12): Certain agricluture and canal employees;

§ 13(b)(13): Certain livestock growers and sellers;

§ 13(b)(14): Certain country elevator employees;

§ 13(b)(15): Any maple sap processing employee;

§ 13(b)(16): Certain employees transporting fruits or vegetables;

§ 13(b)(17): Any taxicab driver employee;

§ 13(b)(18): Certain retail or catering service employees;

§ 13(b)(19): Certain bowling establishment employees;

§ 13(b)(20): Certain police and fire employees;

§ 13(b)(21): Certain domestic service employees;

§ 13(b)(22): Certain tobacco industry employees;

§ 13(b)(23): Certain employees handling telegraphic messages;

§ 13(b)(24): Certain foster parent employees;

§ 13(b)(25): Certain cotton ginning employees;

§ 13(b)(26): Certain sugar processing employees;

§ 13(b)(27): Any motion picture establishment employee;

§ 13(b)(28): Certain forestry employees.

VI. Exempt from minimum wage (§ 6), maximum hours (§ 7), inspection (§ 11) and child labor (§ 12) provisions:

§ 13(f): Employees whose services are performed outside the United States and its possessions.

No. 74-878

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
FILED
FEB 24 1976
MICHAEL RODAK, JR., CLERK

THE NATIONAL LEAGUE OF CITIES, *et al.*,
Appellants,

v.

HON. WILLIAM J. USERY, JR.
Secretary of Labor of the United States,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

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No. 74-878

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

THE NATIONAL LEAGUE OF CITIES, *et al.*,
Appellants,

v.

HON. WILLIAM J. USERY
Secretary of Labor of the United States,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

INTEREST OF THE AMICUS NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

The National Institute of Municipal Law Officers (NIMLO) files this brief, *amicus curiae*, in support of the position of Appellants, National League of Cities, *et al.*, pursuant to Rule 42(4) of the Rules of this Court. The members of NIMLO are political subdivisions of States and this Brief is sponsored by their authorized chief legal officers.

A. History of NIMLO

Organized in 1935, the National Institute of Municipal Law Officers is a non-profit, non-partisan organization composed of over 1400 towns, cities, counties, school districts, villages and other municipal corporations and government units in all fifty of the States, the District of Columbia and Puerto Rico. Since only municipal corporations and other government units may belong to NIMLO, there are no personal or individual memberships. Municipalities participate through their chief legal officers (approximately 6,000) in fact-finding and fact-publishing services designed to collect and disseminate the varied legal experiences of American municipalities. The chief legal officers of NIMLO-member municipalities are uniquely qualified to assess the impact of the 1974 Fair Labor Standards Act Amendments, Pub. L. No. 93-259, on primary state and city concerns. From May 1, 1974 through the present, these chief legal officers have assessed the effect on their municipalities of this Labor Act.

B. Importance Of This Case

The issues presented by this case vitally affect the interest of all municipalities. They present one of those occasional great controversies[1] which establish the ground rules of our whole constitutional order. The National Institute of Municipal Law Officers asserts that only by taming the Commerce Clause before it swallows our whole Federal system can reservation of autonomy to

[1] NIMLO *amicus* Briefs have previously been filed in similar cases. For example, see Brief *Amicus Curiae* in *Baker v. Carr* (No. 103, Oct. Term 1960).

cities and other political subdivisions of States be preserved.

If the Act here challenged is upheld, there remains no foundation from which municipal governments can assert their Federal constitutional rights. The result will most assuredly be further national legislation[2] shifting power to Washington by taking it from municipal government. Aside from this threat, upholding the Act here challenged will mean the permanent and irreparable destruction of local control over local personnel costs, comprising 85% of municipal government budgets.

The case of *Fry v. United States*, 421 U.S. 542, reiterated a balancing test between the impact of exempting State and City operations from a challenged Federal regulatory scheme (and the impact of State and City operations on interstate commerce as the justification for Federal regulation), and the impact of the Federal regulation on those State and City operations. In *Fry*, the balance favored the Federal anti-inflationary regulation, where the State wished to pay in excess of the Federal limits.

In this case, we submit, the same balancing process favors the States and Cities who are Appellants here. The primary nature of the State and City concern, and the secondary nature of the Federal concern are treated in detail in the Argument. Here, we wish to set forth the

[2] Bills to regulate public employee retirement income (H.R. 9155), to extend the provisions of the National Labor Relations Act to States and Cities (H.R. 77), and to establish a separate Federal system to regulate labor relations of States and Cities (H.R. 1488) have been introduced in the 94th Congress, and currently are pending.

facts of impact of the 1974 Labor Act Amendments which cities have appraised. It will be seen that against this deleterious effect on primary State and City concerns, the Congress gave no sufficient commerce-protecting or commerce-promoting reason.

1. The Solicitor General Misunderstands the Effect of the Labor Act Amendments on States and Cities.

The Solicitor General in his original presentation to this Court claimed that all these Amendments do is "add a slight additional cost" (Tr. 54, Oral Argument April 16, 1975) for their personnel to the budgets of States and Cities. He claims the Act does not force States and Cities to change any "policy objective". (*Id.* at 50). He says "the effect it (The Labor Act) will have is slight" (*Id.* at 50) that if "pinched" financially States and Cities need not give up police and fire services but can give up unnamed "peripheral services" which he assumes are unimportant (p. 33). In his presentation the Solicitor General almost totally misunderstood how State and local Governments operate and the enormous intrusion of this Act into those governmental operations. By his argument of slight changes caused by the Act, he admits there is no compelling constitutional Commerce Clause need for this Act insofar as applying it to States and Cities is concerned. Why then impose this massive disruptive double regulation of State and local Governments' largest budget item for a slight effect? The Solicitor General is wrong about the Act's impact, wrong about the Act's cost and wrong about Act's constitutionality under the principles re-enunciated by this Court in *Fry*.

2. The Effect the Solicitor General Would Require to Invalidate the 1974 Amendments Is the Total Destruction of States and Cities.

The Solicitor General argues wrongly that no sovereignty is destroyed by this Act's massive changes and impact upon hundreds of State and local personnel functions and the enormous costs created by the changes which the Act imposes.

The Solicitor General's constitutional test is:

> "The impact upon State and local Government cannot be so severe that State sovereignty is destroyed."

Salaries, pensions and personnel costs are 85% of the budget of nearly every City. The Labor Act Amendments we here oppose place power to control this 85% of City budgets in the Federal Labor Department, and then untimately, if Cities object and fight, in Federal Courts with the Act's new Federal class actions, and attorneys fees.

Thus in ultimate thrust, under this Act, power to make the fiscal decisions that control the fiscal integrity of each City is removed from elected City councils, or town meetings, and given to the Federal Labor Department and to the Federal Courts on appeal.

We in this brief urge that such a vast transfer of governmental power violates not only the Tenth Amendment but our entire constitutional scheme of shared governmental power.

The Act is such a massive intrusion into the fiscal integrity of Cities as to doom forever the entire system of Federalism which has in large measure made our Nation the greatest and strongest on Earth. These Amendments destroy that strength of diversity which is

the keystone of Federalism, and the cornerstone of our entire Federal system, by centralizing ultimate control over governmental spending for local services, and thus over the amount of local taxes, and budgets, in the Federal Government.

3. Duplicate Processes, Duplicate Costs Both Serving No Reasonable Purpose.

At the present time it is reliably estimated that approximately one-half of all City litigation in State Courts involves personnel matters. The Labor Act's Personnel regulations impose upon Cities a duplicate and more costly Federal judicial system, a duplicate and more costly Federal administrative decision procedure, and a duplicate and more costly group of Federal officials who know and care little of the many differences and diversities of this Nation's 18,000 Cities. Further, the new Amendments authorize the application to the public's business of a mass of Federal regulations drafted for private business and unfitted to government operations. Those regulations created by the Labor Department expressly for local police and firemen are unrealistic in actual application by trying to make all 18,000 Cities operate uniformly throughout the Nation, despite diversities required by weather, location, unique businesses and diverse needs. Their pouring of all police and firemen personnel regulations into one uniform mold creates enormous problems costing millions of dollars which Cities do not have and cannot raise. If made effective, many firemen and police, beyond those already fired for budgetary reasons, must be terminated.

4. Federal Court Actions on Most City Personnel Matters Are Practically Guaranteed by the Act's Provisions.

In authorizing new Federal Court actions, power to impose attorneys fees, double and even triple damage payments, and criminal penalties, the Act's provisions and other aids provided for by the Federal Labor Department, practically guarantee that all City personnel matters will be decided in, or with the aid of, that Department and the Federal Courts.

All this new massive layer of costs, officials and courts are laid upon Cities by the Act even though no real rational federal constitutional problems exist in the personnel problems of Cities. Those problems now are, honestly, fairly and much more knowledgeably soluble under State law, and City civil service law, and by State or City administrative decisions, and by State or City official regulatory groups, and by State Courts. This State law and this City law is created for government personnel with understanding of City needs and what the City can pay for and after full City employee hearing or input often through labor unions of their own choice. City personnel are not mistreated. In fact, the media almost daily enunciates City salaries, pensions, leave and their fair and reasonable amounts (or their alleged unreasonable amounts) as fixed by City councils who must live and work daily with these City employees.

There is no compelling constitutional rights of any person, nor any constitutional power in the Federal government, to wipe out all this State and local law – much of it in State constitutions and City charters. The certain, almost endless jurisdictional litigation over what

is preempted by this Act, and what is not, staggers the imagination.

To impose such costly, unnecessary and unreasonable duplication of administrative, legislative and judicial effort upon fiscally struggling Cities for no proper constitutional purpose whatever demands this brief of protest.

5. Cities Do Not Pay Below the Federal Minimum Wage. Congress Cited No Substantial Improvements To Be Achieved By the 1974 Amendments.

In its reports on this Act and the Amendments, Congress says that this Labor Act is supposed to raise wages to fixed minimums but in reality Cities do not pay below those minimums and Congress cited no facts of substance to support its claim. In fact some Cities pay such high wages and other benefits they must cut thousands of jobs to meet budget limits. In its reports on this Act, Congress also says this Act is supposed to spread the work among more employees. But here instead of spreading the work, the Act's effect is to wipe out thousands of jobs.

6. Who are Volunteers? Their use probably is ended.

All over our Nation there have grown up in the past 200 years almost as many unique volunteer arrangements as there are Cities – and there are some 18,000 Cities. Our people take pride in their free public service and provide more of it than any other people in the world.

These Amendments force uniformity and order payment for all work in such vague terms, e.g. § 3(g)'s "employ" includes "to suffer or permit to work" so as to practically wipe out all volunteer work entirely or force the risk of the above-mentioned class actions, attorney fees, and costs for work assumed to be free to cities. No such problems exist in private business and this illustration alone proves that commerce and government are too different to treat identically by declaring all government to be commercial enterprises as does this Act. § 3(s)(5).

7. No Commerce Evil is Cured: No Real Nexus to Commerce is Present.

There is not one scintilla of fact or reason to support or identify the existence of an evil which these amendments cure or a nexus to commerce under any identifiable standard enunciated by this Court up to this time. These Amendments apply to City budgets enacted as law as distinguished from the private acts of private business. The extra costs these Amendments impose cannot be passed along to consumers as can the extra costs of private business. The extra costs can only be met by imposing more taxes or cutting out jobs so the extra costs will not be incurred. Government is "the public weal" *United States v. Harriss*, 347 U.S. 612, 625; and so different from private business that this court has so held, as in *Harriss* just cited. Further, Cities are ultimate consumers and thus in fact exempt from the Act. § 3(i).

No one questions the power of Congress to regulate, and protect commerce, but defining the all of City Government as "commerce" is a false label beyond justification in constitutional law, semantics, or in fact.

8. Strength of Diversity Destroyed For No Reason.

There is tremendous diversity in personnel services, practices, procedures, salaries, pensions, laws, administration and court reviews of the 50 States, 3,000 Counties and 18,000 Cities. Each has different problems and each solves them differently according to the needs and desires or the dictates of those in ultimate control, the voters. Many services like fire and police are now being curtailed of necessity as revenues of Cities and States shrink. The opposite of the *Fry* Case exists here.

9. States and Cities in Fiscal Trouble.

Media reports all State and local Governments in fiscal trouble. Each of the States and Cities and Counties are trying hard to work their way out of this current fiscal trouble by fitting revenues to expenditures.

What does this Act do to aid this trouble?

Our answer is nothing but added trouble.

We urge that City fiscal problems can be cured by good old American initiative at the local level and if left alone Cities will do precisely that. Destroy that initiative by upholding the Labor Department's power to run the major item, 85%, of each City budget and disaster is certain with Federalism but a myth of the past.

10. What Does the Act Accomplish?

According to Solicitor General Bork, it raises 95,000 unidentified persons, out of 11,400,000 employees above the minimum wage level. Although repeatedly

challenged to identify the 95,000 paid below minimum wages, he never has and we do not believe they really exist.

The Solicitor General time and time again in his brief and argument said that the States and Cities claims of enormous aggregate cost impact and interference with their policies and actions was exaggerated. He claims that the Act's impact is less than 1% of State and City budgets. The truth is just the opposite. The Solicitor General's *de minimis* claims are exaggeration in reverse. He is the one who exaggerates and, when in fact he claims Cities here misrepresent the facts it is he who misrepresents the facts by his claim of slight impact and no control of State and local policy. His charges are in fact wrong;he in fact"misunderstand[s]" (Tr. Oral Argument, Apr. 16, 1975, at 63) the Act.

While the illustrations are many, one suffices: He said of Cities:

> "The only power they have lost, Mr. Justice Rehnquist, is to determine to pay substandard wages." *Id.* at 64.

He completely ignores the fact that this is a battle not over substandard wages but about overtime and forced costly charges by changing the way local needs are met by local taxpayers as set forth in this brief.

Never does the Solicitor General point out any substantial evidence that this Act is in any substantial way essential to protect commerce in any way or that it has any real rational relation to commerce.

SUMMARY OF ARGUMENT

The importance which this case has for Cities, and the disastrous impact which the Labor Act Amendments here challenged has on Cities, form a primary State and City concern: the preservation, under our constitutional system, of local control over the 85% of budgets which personnel represents.

Against this primary State and City concern, the Congress posits an extemely attenuated nexus to commerce and an extremely weak national concern.

As with most constitutional issues, this Court is called upon to balance – here a weak, secondary national concern with a primary State and City concern. This construct is consistent with the balancing process inherent in the Constitution and explicitly recognized in *Fry v. United States*, 421 U.S. 542, 547 n.7. On the facts of this case, the balance must be struck on the side of the Cities' and States' primary concern.

It is the balancing of the weak national against the strong State and City interests in this case, which makes clear that no decision of this Court can be cited as controlling here, not even *Maryland v. Wirtz*, 392 U.S. 183, which the Solicitor General urges as the complete answer to the facts of this case (see, e.g., Appellee's Brief, Question Presented).

The *Amicus* urges that analysis of the facts reported by Cities, within the balancing construct submitted, shows the unconstitutionality of the 1974 Labor Act Amendments.

ARGUMENT

I.

THE PRESENT CONSTITUTIONAL CHALLENGE IS ONE OF THOSE TRULY SEMINAL CASES WHICH ARISE INFREQUENTLY BUT WHICH GO TO THE ROOTS OF OUR SYSTEM OF GOVERNMENT.

The ultimate issue which may be reached in this case is whether the interstate and foreign commerce power authorized in Article I of the Constitution is limited at certain points by the concurrent principle of Federalism which is the foundation principle of our constitutional order, our political order, and indeed our social order. This is one of those truly seminal cases which arise infrequently but which go to the roots of our system of government – analogous to *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, and *United States v. Nixon*, 418 U.S. 683 concerning that other great principle which also pervades the whole Constitution – Separation of Powers.

The 1974 Amendments to the Fair Labor Standards Act of 1938 would subject all State and local Governments, in respect to all of their nonsupervisory employees (with insignificant exceptions), to the jurisdiction of the Federal Department of Labor in respect to wages, hours, overtime and related matters. Even supervisory, policy-making and elected employees and officials come within the Labor Department's recordkeeping requirements. The Act thus asserts Federal jurisdiction over the core of State and local personnel policies and local budgeting and local responsibility therefor, including flexibility of work

assignment as affected by rigid Federal overtime regulations.

It is important to note what this challenge to the 1974 Amendments involves, and what it does not involve. We are questioning whether there is sufficient relation to commerce on the precise facts here to create any valid basis for the asserted congressional power. We strongly assert that in any event Federalism does not permit the inroad attempted here on State and local Government power over its own employees, who are not even working on nationally-subsidized programs.[3]

We are not trying to re-argue that quite distinct concept, sometimes called "Dual Federalism" and exemplified by such cases as *Hammer v. Dagenhart*, 247 U.S. 251, *Bailey v. Drexel Furniture*, 259 U.S. 20, and *United States v. Butler*, 297 U.S. 1. "Dual Federalism" as appealed to in those cases consisted of the proposition that the power to regulate private conduct reserved to the States under the Tenth Amendment constituted a built-in check on national power, specifically, a restraint on extending national authority over intrastate activities traditionally viewed as being within the State's domain, even though the activities affect interstate commerce in some way. On this basis the Court in *Hammer* and *Bailey* turned aside Congressional attempts to regulate child labor, even though goods were being produced for commerce, and in *Butler* the Court nullifed the New Deal's first attempt to regulate farm production. *Hammer* was overruled in *United States v. Darby*, 312 U.S. 100 in which – again in the context of regulation of private

[3]See *Oklahoma v. Civil Service Commission*, 330 U.S. 127, discussed in Brief for Appellants, p. 93.

business – the Court announced the principle that the reserved powers of the States under the Tenth Amendment do not begin until the national powers under Article I, as stretched by reasonable implication, end. Summing up in an oft-quoted line, Justice Stone said that the Tenth Amendment "states but a truism that all is retained which has not been surrendered." 312 U.S. at 124. *Darby* upheld the constitutionality of the Fair Labor Standards Act of 1938, the parent statute of the 1974 Amendments now at issue, and appeals to the Tenth Amendment as a check on national power have been in somewhat bad odor ever since.[4] But all of these "Dual Federalism" precedents and the resultant tarnished image of the Tenth Amendment must be kept in the context of their factual settings – the allocating of policy control as between Federal and State Governments over *private* activities which are in commerce or substantially affect commerce.

This case presents no such issue. We deal here with a different kind of "truism," more basic than the Tenth Amendment (albeit also supported by the Tenth Amendment). This is the truism that the very concept of "State" as understood throughout our Nationhood and recognized throughout the constitutional text is a concept presupposing a high degree of State autonomy in arranging the structure and operation of State Government itself. This broad, traditional, autonomy principle regarding the internal affairs of State Government is, of course, subject to limitation by specific constitutional clauses such as those affecting the

[4]See comment of Justice Jackson, Brief for Appellant, pp. 98-99.

freedom of expression rights of State and local employees, or prohibiting racially discriminatory practices.[5] No such limitations are at issue in the present case.

Indeed, this Court has itself given significant support to the broad autonomy principle regarding the *internal* affairs of State and local Government in its line of cases dating from *Luther v. Borden*, 48 U.S. (7 How.) 1 in treating as political questions lying outside the realm of judicial review the claims which have arisen under the constitutional clause (Art. IV, Sec. 4) guaranteeing to each State a "republican form of government." *Luther* involved the question of which of two governments was legitimate after an insurrection. In *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 the Court refused to decide a claim that the initiative and referendum procedure for enacting laws, thus bypassing the State legislature, violated the Guarantee Clause. The effect of such decisions is to leave the matter for resolution by whatever political processes are available. Normally these processes are the autonomous State political processes. Such was the case in *Pacific States*, and also in the frequent early judicial refusals to adjudicate State power over the State legislative apportionment and congressional districting.[6]

[5] See, *e.g.*, *Pickering v. Board of Education*, 391 U.S. 563 dismissal of school teacher for writing letter attacking school board's financial management; *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1972), *cert. den.* 406 U.S. 950, discrimination in hiring of fireman; *United States v. Montgomery County Board of Education*, 395 U.S. 225, faculty desegregation.

[6] See, *e.g.*, *Colegrove v. Green*, 328 U.S. 549; *MacDougall v. Green*, 80 F. Supp. 725 (N.D. Ill. 1948), *aff'd*, 335 U.S. 281; *South v. Peters*, 339 U.S. 276, *Anderson v. Jordan*, 343 U.S. 912; *Radford v. Gary*, 352 U.S. 991, see generally Dixon, *Democratic Representation:* Reapportionment in Law and Politics, 104-114 (1968).

In *Luther*, to be sure, the resolution of the matter was said to turn on congressional action. But this was not congressional action pursuant to any general congressional power to disregard State autonomy over internal affairs of government. Rather, it was pursuant to the expressly authorized congressional power (Art. I, Sec. 5), necessary to the operation of the nation, to judge elections and seat the appropriate members sent to Congress from the States. State activity in respect to legislative apportionment and congressional districting is now, of course, subject to extensive judicial scrutiny, but again the inroad on State autonomy here, like the inroad under the First Amendment (cited *supra*), is only to vindicate the effectiveness of a personal right, here the right to vote. *Baker v. Carr*, 369 U.S. 186, *Reynolds v. Sims*, 377 U.S. 533.

This same sense of a high degree of State autonomy, at its highest regarding governmental arrangements, per se, such as public personnel policies, undergirds Professor Herbert Wechsler's notion of the "political safeguards of Federalism" safeguards needed lest the process of plausible expansion of national power, each step seemingly only an incremental advance on the preceding step, causes us to lose sight of our Federalism starting point. To be sure, Wechsler was writing primarily in terms of the role of the States in the composition and electoral selection of the national government. But the informing premise was the intrinsic value of Federalism, not merely the means of preserving it.[7]

[7] Wechsler, *"The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government,"* 54 *Col. L. Rev.* 543 (1954), as reprinted in Association of American Law Schools, *Selected Essays on Constitutional Law* 185 (1963). His lines about judicial deference to congressional judgment relate only to the nation-State division of power in regulating the private sphere, and not to matters affecting the independence of State Governments, per se.

Federalism thus is not only an original value, it is an enduring and high value in our constitutional system. No constitutional value, of course, not even freedom of speech[8] nor the privilege against compulsory self-incrimination,[9] is an absolute in our constitutional order. As the above-discussed demise of "Dual Federalism" under our distribution of powers system indicates, there is no clear line demarking a point beyond which national powers may not be exercised over intrastate commerce or other matters. Nor do we assert any absolute immunity – or even easily-defined point of immunity – of State Governments per se from appropriate national regulation in the interest of vital, paramount, and constitutionally-authorized national purposes. (See *infra* at 24)

In short, the present case is unique. To demonstrate the unconstitutionality of the 1974 Amendments to the Federal Fair Labor Standards Act, it is not necessary to reverse past precedents of this Court, although, of course, just as there are no constitutional absolutes, no past precedent should be viewed as sacred. In this area of Federalism what is needed is not a repetition of the absolute language of the past but rather, in the language of Professor Paul Freund, a search for "intermediate principles more tentative, experimental and pragmatic."[10]

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[8] *Dennis v. United States*, 341 U.S. 494; *Cox v. New Hampshire*, 312 U.S. 569.

[9] *Kastigar v. United States*, 406 U.S. 441; *Brown v. Walker*, 161 U.S. 591.

[10] Freund, *Umpiring the Federal System*, 54 Col. L. Rev. 561, 578 (1954).

II.

THERE CAN BE NO POWER UNDER THE COMMERCE CLAUSE HERE WHERE A NATIONAL SECONDARY CONCERN OR ACTIVITY COLLIDES WITH A STATE PRIMARY CONCERN OR ACTIVITY.

With this background let us turn to the constitutional questions, and put them in broad perspective appropriate to a basic institutional dispute of this dimension. The argument in favor of the 1974 Amendments is based on a grandiose view of the ever-expanding commerce power, each incremental addition being not too surprising until we look back and see how far we have come. The argument against the 1974 Amendments by Plaintiff-Appellants here rests on two perceptions. It rests on the need to recognize that strong as it is the Commerce Clause was never intended to be a charter for a unitary government (see Justice Stewart, dissenting, *Perez v. United States*, 402 U.S. 146). As Mr. Justice Stewart put it:

> It is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting. And the circumstance that loan sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets. 402 U.S. at 157-158.

Plaintiff-Appellants also argue that State autonomy in the internal affairs of State-local Governments is the quintessential requirement for maintaining our constitutional Federalism in spirit as well as in form. The Government's Commerce Clause argument, pushed into the very core of Federalism, is an extraordinary

example of the oft-ignored observation by Benjamin Cardozo of "[t]he tendency of a principle to expand itself to the limit of its logic . . ."[11]

There comes a time when reality must prevail, when we must raise our eyes high enough to perceive the implications of what we are doing, when first principles must be reasserted. There is a striking parallel between the development of the present issue of scope of Federal intrusion over State personnel practices, and the development of "one man-one vote" theory and practice, which also has a major impact on State-local Government structure and autonomy.

The early reapportionment rulings were unexceptionable; gross population malapportionment, producing "rotten boroughs," had to go. The equal population district concept, although effective to solve the rotten borough problem, had little to contribute toward solving the problem of political misrepresentation, but it did keep districting in turmoil. In the 1973 cases, this Court, while not at all abandoning the substantial equality principle as an aspect of fair districting, recognized the political purpose and effect of all districting, and announced some limiting principles

[11] *Nature of the Judicial Process* 40-50, 51. (Yale University Press 1921).

responsive to the real issue of fair representation. *Mahan v. Howell*, 410 U.S. 315; *Gaffney v. Cummings*, 412 U.S. 735; *White v. Regester*, 412 U.S. 755.[12]

Likewise in this case, on the question of Federal intrusion into State personnel practices, we reach a constitutional turning point. The proper answer cannot be achieved just by juggling numbers and dollars, and trading charges of short-run de minimis effect either on the States or on the economy, or by adding one more brick to the Commerce Clause edifice. The Commerce Clause here collides with Federalism – an important

[12] Professor Casper has made this comment about the reflective nature of the 1973 reapportionment decisions:

> "With regard to last Term's apportionment cases, it seems that the Court is moving from policing numbers to viewing representation as a concept which needs further clarification. It is doing so within the broad framework established by the Warren Court, while simultaneously turning away from *syllogistic reasoning*. This is accomplished by *deemphasizing the catchwords in favor of a case-by-case strict scrutiny*." Casper, "Apportionment and the Right to Vote: Standards of Judicial Scrutiny," 1973 Sup. Ct. Rev. 1, 32, (Emphasis added).

The State legislative reapportionment cases are not the only example of instances when established trends of interpretation need fresh scrutiny and reevaluation from a broader perspective. Another good example is provided by the 1972 witness immunity decisions, *Kastigar v. United States*, 406 U.S. 441; *Zicarelli v. New Jersey*, 406 U.S. 472, which clarified the Fifth Amendment's self-incrimination provision and upheld the validity of full "use and fruits" immunity as a replacement for the traditional absolute immunity which had precluded prosecution even with independent evidence. The essence of the earlier decision was retained while their excesses were contained. See *Brown v. Walker*, 161 U.S. 591; *Counselman v. Hitchcock*, 142 U.S. 547.

national power and a cardinal institutional principle in apparent conflict.

In order to ascertain whether the national or State interest is the weightier when the core of Federalism is touched, *i.e.*, State autonomy in internal government affairs, we should think in terms of a continuum, not in terms of absolutes.[13] This is exactly the way we best approach the other cardinal and equally delicate institutional area in our constitutional order – Separation of Powers. On the latter, *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579, and especially the oft-referred to opinion of Mr. Justice Jackson, is exceptionally sophisticated and instructive. It provides a directly relevant guide for our present task of deciding where to draw the line on national instrusive power over State governmental policies and internal operations.

The issue in *Youngstown* was the classic one of drawing the line between the law-making power of the Congress and the law-making power of the President.

Eschewing absolutes, Mr. Justice Jackson suggested a realistic and helpful analytical framework as follows:

> "1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .
>
> "2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .

[13]Oh the rejection of absolutes in matters of Federalism see comment of Mr. Justice Black in *Younger v. Harris*, quoted Br. for Appellant, p. 108.

> "3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter . . ." 343 U.S. at 635-637.

The issues presented in this case and the other major Federalism cases from *Sanitary District of Chicago v. United States*, 266 U.S. 405 and *United States v. California*, 297 U.S. 175 down to the present lend themselves to a similar identification and balancing of common or basic variables. Ever bearing in mind that we are not dealing with matters susceptible of being neatly compartmentalized, the following construct has helpful analytical value in grouping and contrasting the cases.

First, the national government's interest in imposing national policies on States is in some instances *primary*. In other instances it is *attenuated* or derivative as under the outer reaches of the "affecting commerce" concept when utilized to extend social policies to activities having no nexus to commerce except as part of a "class." *Perez v. United States*, 402 U.S. 146; *cf. United States v. Five Gambling Devices*, 346 U.S. 441; *Rewis v. United States*, 401 U.S. 808; *United States v. Bass*, 404 U.S. 336. See also,Stern, *The Commerce Clause Revisited - The Federalization of Intrastate Crime*, 15 Ariz. L. Rev. 271 (1973).

Second, the impact of national action can either be on State activities of a "uniquely governmental" nature, in which the State has a *primary* interest in autonomy, or on State activities of "proprietary" or "non-exclusive service" nature, in which case the interest in State autonomy becomes more *attenuated*.

A. National Primary Concern or Activity vs. State Secondary Concern or Activity.

Within this construct when a policy falling in the *national-primary* area collides with a State policy falling in the *State-attenuated area*, the former should prevail. The following cases fall in this category: *United States v. California, supra; New York v. United States*, 326 U.S. 572; *Board of Trustees of University of Illinois v. United States*, 289 U.S. 48; *Case v. Bowles*, 327 U.S. 92. In *California*, involving application of the Safety Applicance Act to a State-owned railway which handled interstate cars as a vital nexus in interstate movement, there was a national-primary interest because the very core of the Commerce Clause is reached in a situation directly involving interstate movement and safety. The State activity was "proprietary," despite the Court's disavowal of the term, hence the interest was attenuated. *New York* lends itself to a similar analysis – the national tax power, versus another non-essential State activity, marketing mineral waters. *Board of Trustees* involves foreign imports, where there is a uniquely exclusive constitutional commitment to national control, and impact on a State activity, higher education, which is a non-exclusive State service shared with the private sector.

In *Case* the state of Washington argued unsuccessfully that it could not be subjected to the World War II Emergency Price Control Act in respect to sale of state-owned timber held for the "support of the common schools." The state interest in *Case* is at a secondary level because however education might be classified, at stake was only one aspect of state financing, not schools per se. This state interest in *Case*

collided with a congressional policy in which there was a vital, primary, national interest, and it had to yield. Otherwise, as Mr. Justice Black put it in his opinion for the Court, "the constitutional grant of the power to make war would be inadequate to accomplish its full purpose. And this result would impair a prime purpose of the Federal Government's establishment." 327 U.S. at 102. By analogy to the *California* case, *Parden v. Terminal R. Co.*, 377 U.S. 184 may also be classified here.

B. National Primary Concern or Activity vs. State Primary Concern or Activity.

When a policy falling in the *national-primary* area collides with a state policy falling in the *state-primary* area we have a more difficult situation, but one in which considerations of federal supremacy normally tip the balance in favor of the national policy. Examples include *Fry v. United States*, 421 U.S. 542, and *Sanitary District, supra.*

In *Fry* there was a re-play on *Case*, with two important distinctions. The issue was the application of peacetime wage-price stablization under the 1970 Act, and the coverage extended to all State-local employees regardless of the function being performed. Hence, here the vitals of State government *are* being touched, yielding a State primary interest. On the national side the commerce rather than the war power is the basis for the law. This is the use of the Commerce Clause in relation to a matter, inflation control, which is a subject "imperatively demanding a single uniform rule," *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299, and vital to our national

well-being in commercial and monetary matters.[14] The distinction in *Cooley* and other early Commerce Clause cases between primary and secondary zones of concurrent non-conflicting authority in the latter but not the non-conflicting authority in the latter but not the former) has, to be sure, been somewhat eroded over the years in the sequence of decisions extending national jurisdiction over ever-more-peripheral activities. However, it retains special vitality, and indeed is a necessary concept in the interest of intelligent adjudication of Federalism principles when the national legislation not merely affects peripheral State government actions as in *California*, *supra* and *New York*, *supra*, but intrudes into personnel and budgets per se.

With respect to *Fry* the exempting State-local salaries from national wage stabilization would have allowed these units to "raid" the national government and the private sector for employees. The full coverage was needed to avoid direct intermeddling. Absent such coverage there would be pressure on other employers to find a way around wage stabilization in order to avert State-local raiding. Thus full coverage also was needed to avert maneuvering and avoid an enforcement problem for the national government.

Hence, in *Fry* a national primary concern collided with a State primary concern, *i.e.*, the application of national economic stabilization policy to State personnel and budgets. This Court decided that the national concern was paramount. But with the trump card of

[14] It is not too far-fetched to suggest that national inflation policy rests not solely on the Commerce Clause but on the monetary clauses themselves, as to which there concededly is a national plenary power. See *Norman v. Baltimore*, 294 U.S. 240; *Legal Tender Cases (Juilliard v. Greenman)* 110 U.S. 421.

the war power lacking there was one dissent and the majority opinion said that the Tenth Amendment "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a Federal system." 421 U.S. at 547 n. 7. No such impairment was seen. Furthermore *Fry*, unlike the present case which arises under the 1974 Fair Labor Standards Act Amendments, did not involve direct interference with work scheduling through Federal control over overtime regulations.

The old case *Sanitary District of Chicago v. United States*, 266 U.S. 404, likewise can be placed under this heading, for both interests in conflict were of primary concern. The District, a State agency, wished to continue to use the waters of Lake Michigan at the existing rate for purposes that included sanitation and water supply interests which go to the core of the purpose of government. The Attorney General of the United States sought, and obtained, an injunction to materially restrict the diversion, relying on the Commerce Clause and a Canadian Treaty, in the interest of preserving the lake level and navigability. The City of Chicago and States bordering on the Mississippi were allowed to file briefs. *Sanitary District* therefore presents "Federalism" issue of a different sort from the ones in the cases discussed above, and the Court's decision in favor of the Attorney General, speaking of the "edict of a paramount power," (266 U.S. 432) is quite understandable. For this case involved not merely "commerce" but Federal allocation of a scarce interstate resource. This is the one thing only Federal authority can do; indeed, it can be done by this Court alone under Article III in original suits between States. *Kansas v. Colorado*, 206 U.S. 46.

Arguably, *Pennsylvania v. Nelson*, 350 U.S. 497 can be listed here too for it involved national-State mutual "primary" concerns about subversion against government.

C. National Secondary Concern Or Activity vs. State Secondary Concern Or Activity.

Like the foregoing category of a facially equal balance between a primary national concern and a primary State concern, with the nod going to the national government, there may be also a facially equal balance between a national secondary concern and a State secondary concern. *Maryland v. Wirtz*, 392 U.S. 183, is such a case. Again the nod went to the national government, with dissents by Justices Douglas and Stewart, and Mr. Justice Marshall not participating.

In *Maryland* it cannot be said that either the national concern or the State concern is at a "primary" level. When the Commerce Clause is used as a basis for nullifying interstate trade barriers or burdens, for promoting safety in transit and honesty in interstate dealings, for allocating scarce resources be they water or air waves, it is being used to achieve core purposes associated with the creation of the national government. A process of attenuation begins, although the power is still legitimate, when the Commerce Clause is used as a basis for imposing on intrastate activities various congressional economic and social policies.

Some nexus with commerce, or theory of nexus with commerce, is needed as a constitutional peg, but the focus is more on the intrinsic worth of the policy in question as a police power matter, than on the needs of effective interstate operation, per se. With the primary

focus on the social or economic policy, *i.e.*, prohibiting child labor, or curbing extortionate credit transactions, an inverted process of analysis tends to occur. The effort is to see how far the national reach can be stretched, in the interest of approximating as nearly as possible the power Congress would have in a unitary State. And we have seen that the affecting commerce concept, somewhat in the spirit of the "for want of a nail a shoe was lost. . . ," lines, can be considerably attenuated, often on a merely assumed sets of facts, before the breaking point is reached.

Indeed, once certain loose formulae are adopted, there is in truth no logical stopping point. For example we have tended more and more to treat the Commerce Clause as a "national economy" concept yielding broad power over any factor which may affect the total national supply and demand. See *Wickard v. Filburn*, 317 U.S. 111, regarding home-grown, home-consumed wheat. Such reasoning was an important element in working out a commerce clause basis for the public accommodations portion of the Civil Rights Act of 1964 in its application to an intrastate restaurant, without need to show presence of any interstate consumer. *Katzenbach v. McClung*, 379 U.S. 294. Obviously, by such reasoning, we also can articulate a "rational basis" for national jurisdiction over birth control and family planning, for this is the most critical annual supply and demand variable affecting the national economy.

We can even reach the point of attenuation when no nexus with commerce need be shown, if a law enforcement problem might be eased by full Federal control. Commenting on *Perez v. United States*, 402 U.S. 146, Stern asks, and on the basis of *Perez* answers in the affirmative, this provocative question: "Can Congress

forbid the possession or transfer of all pills, or of all white pills, because of the difficulty of distinguishing dangerous pills from others and because some might move interstate?" Stern, *The Commerce Clause Revisited – The Federalization of Intrastate Crime*, 15 Ariz. L. Rev. at 280 (1973).

Again, we are not contending that this process of construction is illegitimate as applied to the private sector, so long as particular personal liberties are not infringed. But it *is* a process of *attenuation*, and this factor must be taken into account when the attempted regulations impringes on internal aspects of State and local Government. As the Court said in *Fry*, the Tenth Amendment gives explicit recognition to retention of State governments, and necessarily some degree of State autonomy, as an independent constitutional value.

An analysis based on the Commerce Clause alone prejudges the answer. Explicit consideration must be given to Federalism in developing viable lines between national legislative power and State Government autonomy.

In *Maryland v. Wirtz*, however, when we turn from analysis of the national interest to analysis of the State interest in respect to the employees there covered by the 1966 Fair Labor Standards Act Amendments, we find a somewhat mixed picture. These amendments did not cover all State-local employees regardless of function and therefore did not raise a State primary concern, aswas the case in *Fry*, discussed *supra* (and overborne in *Fry* by a primary national concern). The 1966 Amendments covered transit, hospital, school employees (29 U.S.C. Sec. 203(r), with the standing exemption of professional and supervisory employees dating from 1961 (29 U.S.C. Sec. 213 (a)(1)). The core of State government was not

touched therefore, as was the case in *Fry*, and as is the case here. The coverage of transit and State institutional employees raised only a State secondary concern, because these are nonessential services commonly provided privately too. Schools, to be sure, are nearer the line, but teachers and supervisory personnel were exempted.

It must be stressed that we are dealing with an inexact continuum providing a more realistic basis for analysis than heretofore, but necessarily inexact given the nature of the tension of values at issue. This Court does retain the sovereign prerogative of choice.

The basic thrust of Mr. Justice Harlan's opinion is in accord with this analysis. He said the commerce power would not be carved up "to protect enterprises *indistinguishable in their effect on commerce from private businesses* simply because those enterprises happen to be run by the States for the benefit of their citizens." 392 U.S. at 198-199 (emphasis added). And further indication that Mr. Justice Harlan had in mind only those State activities which have direct analogies to private activities, and not State-local government in general, as found in his express disclaimer of any intent to sanction a Congressional power to "declare a whole state "enterprise' affecting commerce and take-over its budgeting activities." 392 U.S. at 196-97 n. 27.

To summarize on the facts of the coverage at issue in *Maryland v. Wirtz*, and facts are more important than rhetoric here, it may be noted first, that all of the "enterprises" in *Wirtz* were identifiable, separate subparts of the State Government, and inside each no statutory "relatedness" problem was raised. This is in stark contrast to the "joint employment" and "volunteer to a second government agency" problems presented when the Act of *Wirtz* is extended in its 1974 Amendments to encompass all of State and local Govern-

ment. Second, all were "economic" or quasi-economic in the sense that all had counterparts in the private sector. Third, all were severable in the sense that a State can sell or lease to the private sector the operations of transit, hospitals, and even schools, or close them down, absent invidious racial purpose. *Griffin v. County School Board*, 377 U.S. 218; *cf., Palmer v. Thompson*, 403 U.S. 217. Fourth, it is true that all "used" goods which had come through interstate commerce, but a simple, across-the-board "use" test, which a fortiori would encompass all State-local Government and all life, was repudiated by Justice Harlan in his footnote 27, cited *supra*.

In short, *Maryland v. Wirtz* presented the Court with a "standoff" situation with neither national primary concerns nor State primary concerns at stake. In that situation, the principle of Federal supremacy again prevailed, just as in the situation with facially equal primary interests at stake.

D. National Secondary Concern or Activity vs. State Primary Concern or Activity.

When a *national primary* concern or activity is confronted by a *State secondary* concern or activity, national power is at its maximum, as indicated in the discussion in Category 1 above. When the two intermediate categories are reached, Categories 2 and 3 above, some close calls may be unavoidable particularly in Category 3. Nevertheless there has been a tendency to uphold the national power. When the present Category 4 is reached and a *national secondary* concern or activity under an attenuated commerce concept is confronted by a *State primary* concern or activity,

national power is at its minimum. Barring very special justification, it should not prevail. We submit that this challenge under the 1974 Amendments presents such a case.

1. The Primary Nature Of The State Concern In Respect To The Impact Of The 1974 FLSA Amendments Flows From Several Considerations.

Abandoning the enterprise concept, which does have certain internal logic and consistency, Congress by simple declaration has swept all State-local employees (excepting supervisory, professional and political) under the Labor Act and stated that they all shall be "deemed" to be commerce-connected, without exception. 29 U.S.C. Sec. 203(s) as amended. The coverage extends from the most conventional common services overlapping the private sector (*e.g.*, homes for the aged, hospitals) to the most essential type of employees working at the core of those activities uniquely governmental. The partial exemptions provided for fire and law enforcement activities are given by grace, not by concession of insufficiency of constitutional power. 29 U.S.C. Sec. 213(b)(20)

The 1974 Amendments in particular touch a State primary concern because of the impact of the overtime provisions on work scheduling, on compensatory time off in lieu of overtime (snow removal being an especially dramatic example), and on use of volunteers and part-time workers, to mention only a few. (See Brief for Appellant, p. 34-35; Reply Brief, p. 4-6).

Furthermore, the State-local Governments are not being subjected here to a clear simple rule. The long list

of statutory exemptions[15] and qualifications, supplemented by extensive rulemaking by the Secretary of Labor, have the effect of subjecting the State-local Governments to a voluminous, shifting, and in some instances petty body of detailed do's and don'ts. (See Brief for Appellant, p. 32).

The monetary impact of the 1974 Amendments is not the dominant aspect of our Federalism argument; the foregoing points are more important. See Br. for Appellant, pp. 82-92. But the monetary impact is real, and not de minimis. There is an annoying double-standard aspect to the Government's approach to the

[15]The basic thrust of the Appellee's case is that Congress can regulate State-local employees' wages-hours-overtime matters to ward off dangers of labor disputes which would diminish State-local use of interstate goods, dangers of unfair competition to induce industry to come in, and to spread the work. Laying aside our critique of these supposed dangers, even if the dangers are assumed to have some reality, the Act itself demonstrates that the national interest does not rise to the level of a primary concern – because of the startlingly long list of 28 exceptions to the Act, many of them quite extensive in effect. 29 U.S.C. Sec. 213. These exemptions show how attenuated the "commerce" protection or promotion concern is. A State legislature, to be sure, with plenary regulatory power, can choose to take a "step at a time." *Williamson v. Lee Optical,* 348 U.S. 483. When the legislative power base is commerce, however, the presence of exceptions such as these - directly impacting on the supposed purposes of the Act - undercuts the validity of the asserted jurisdictional theory itself.

monetary impact question. When the Government seeks to belittle the Plaintiff-Appellants' State burden argument, it focuses on the relatively small number of State-local employees who are now "substandard" and would be affected by the Labor Act. It says little change will occur. But when the Government seeks, as it must, to demonstrate the needed nexus with commerce it switches and uses gross figures in respect to State-local employees, budgets, purchases, and use. It cannot have it both ways. (Compare Brief for Appellee, p. 32 with p. 41, see Brief for Appellant, p. 24-26; Reply Brief, p. 4).

2. The Secondary Nature of National Concern In This FLSA-Federalism Dispute Likewise Flows From Several Considerations.

It is not necessary to repeat here the Commerce Clause discussion in Category 3 above, demonstrating that the national concern was at a secondary level in *Wirtz* also. But some significant points may be added.

A functional, realistic "impact" analysis demonstrates that the relation to commerce of the State-local personnel practices which would be affected by the 1974 Amendments is certainly de minimis and perhaps borders on zero.

Even assuming some higher wage payments resulting from application of the 1974 Amendments, it is unlikely that this would have a beneficial effect on commerce, or remove any detrimental effect attributable to present practice. The reason is that higher wage payments would constitute only an *internal transfer* inside the State, and would not affect the State's demand for or use of interstate goods. If the States pay lower wages than the Labor Act would require, the result is not to reduce the demand

for interstate goods, because, as a reciprocal corollary to the lower wage payment, the State (or citizens through lower taxes) have more money for interstate goods. Hence, the State nexus with commerce on a "user" theory is unaffected by the Labor Act issue; the question instead is distribution of money within a State with commerce impact a constant. This is rudimentary economic realism in the style of the University of Chicago "school" of economic analysis.

One thing to bear in mind about this last point is that it undercuts *Wirtz* too, unless undue stress is placed on the supposed competitive relationship between, for example, a private hospital and a State hospital. It could be said (although *Wirtz* does not read that way) that the *Wirtz* holding is a safeguard against undue inroad on national wage policies by the device of transfer of vast ranges of "services" from the private sector to the public sector. No such danger arises from preserving the exemptions at issue here. This point is another way of providing a special explanation for *Wirtz*, and distinguishing it from the present controversy.

Although the "user" theory is the Government's primary reliance, other theories likewise do not show a substantial or meaningful impact on commerce emanating from State-local personnel policies not exempted from the Labor Act, and most certainly do not show the presence of a national primary-level concern. Neither the "unfair competition" theory, the "labor dispute" theory, nor the "spreading the work" theory are credible as giving rise to a national interest anywhere near strong enough to justify the intrusion into the core of Federalism and State autonomy attempted here.

Because State Governments are not exporters of

products, through use of the employees at issue here, the "unfair competition" theory of *United States v. Darby*, 312 U.S. 100, has little or no relevance. Low wage rates or disregard of the Labor Act's requirements do not result in States being able to undersell others on the interstate market, and thus drive other wages down. (Indeed Mr. Justice Harlan in *Wirtz* used the *Darby* unfair competition theory only in his general discussion of the new 1961 enterprise concept, and did not utilize it in the portion of his opinion discussing coverage of certain State-local employees under the Act.). The other suggestion of the Government (Brief for Appellee, p. 22) that lower public wages may permit marginally lower tax rates, making the State attractive to industry, is fanciful and totally unsupported factually. Indeed, to meet inference with inference, it would seem that the miniscule amounts represented by the *gap* between wages actually paid (most being well-above the Act's requirements) and required wages could have no measurable influence on taxes. There simply are no States and Cities paying wages below the minimum.

The "labor dispute" theory, *i.e.*, that wages below the Labor Act's minima are a cause of strikes, during which State-local Governments "use" fewer interstate goods, is at best tenuous and hardly provides an adequate basis for the far greater inroad on State autonomy here than occurred in *Wirtz*. Factually, although strikes do occur in State and local Governments, it has not been demonstrated that lack of Fair Labor Standards Act coverage is a cause of such strikes. (See Reply Brief, p. 40.) The "spreading of the work" theory, apparently not vigorously asserted by the Government, has the prime vices both of being logically limitless, and of imposing burdens on

State-local Governments to solve a national problem more properly handled by national economic up-lift programs – for our financial strength is in our national government, not our State-local Governments. The fact is that the States and Cities in their current fiscal crisis are cutting down drastically on the number of persons they employ so the Amendments have an opposite effect to the purposes of the Act in spreading employment. By making State and local services more costly the Amendments reduce the number of State and local jobs; they thus do not spread work or create jobs – they destroy jobs.

Nor does the recent decision in *Fry v. United States, supra*, lend support to the Government's position in this case. Exempting State-local salaries and wages from the emergency Economic Stabilization Programs would have allowed State and local Governments to attract Federal and private sector employees, thus directly and unfairly interfering with the Federal and private sector work forces. Against the 28 exceptions to the Fair Labor Standards Act must be set the universal coverage of the statute in *Fry*. Here, given the much more ephemeral and attenuated nature of the commerce-based national interest, continuing the present exemption from the Labor Act would have indirect, peripheral, and indeed perhaps no measurable impact. (See more detailed impact discussion, above.)

In short, with this case we are at the point where national legislative power to intrude on the State autonomies traditionally and currently (*Fry, supra* footnote 7) viewed as components of constitutional Federalism, is at its lowest ebb. As was learned at the recent Seventh World Conference on Law these autonomous components of Federalism are traditional with all Federal nations and

no such nation growing out of the common law experience (to include Canada, New Zealand and Australia) permits the national Government to exercise the power of control over local Government which Appellee would here assert. (See, e.g., the British North America Act of 1867 §§91,92 and cases decided thereunder). The assertion of this power, therefore, is unheard of in the entire experience of common law Federal nations.

III.

MORE THAN A SIMPLISTIC RATIONAL BASIS TEST MUST BE HERE EMPLOYED TO ACCOMMODATE THE FEDERALISM PRINCIPLES AT ISSUE

We are told that if Congress can find a rational basis for exercise of commerce power, it can do so – without more – even against the State Governments' internal affairs. We respond, not so. Unlike private business payrolls, State payrolls are protected by one of the two highest principles in our constitutional order, the principle of Federalism. Hence, a higher-than-rational basis is required to justify action impacting on State payrolls and personnel. Indeed, something analogous to the showing required of a State under the strict scrutiny test developed under the Fourteenth Amendment Equal Protection Clause in respect to suspect categories and fundamental interests is required.

Such a showing by the Government is required here not just because a constitutional value can be pleaded by Plaintiffs-Appellants but because in the two large areas of Federalism and Separation of Powers the

fundamental rule – operating on both contestants – is restraint and accommodation. That is a rule of life in these areas. For example, in Separation of Powers, President Nixon lost the tapes suit not just because there was a "rational basis" for wanting access, but because the tapes were essential to a criminal trial – a vital public interest. And in *Sanitary District*, Illinois lost not just because there was a rational basis for national action, but because only the national government can allocate scarce resources. *Fry* can be viewed in similar light, and likewise *United States v. California*, although in the latter there was the added factor that the level of State concern was secondary, not primary.

The "rational basis" test proves too much. Congress would never lack a "rational basis" for subjecting State Governments to particular, uniform, national purposes, once Federalism is laid aside and we look only at national power and Bill of Rights checks, as though we were in a unitary State.

That such an approach is abhorrent to the careful analysis of Federalism is shown by *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975) which is at this Court for review, and similar cases.[16] Even the sanctions[17] which

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[16]See *Arizona v. EPA*, 8 E.R.C. 1238 (9th Cir. Sept. 8, 1975); *Maryland v. EPA*, 8 E.R.C. 1105 (4th Cir. Sept., 1975); *District of Columbia v. Train*, ____ U.S. App. D.C. ____, ____ Fed. 2d ____ (Oct. 28, 1975).

[17] "The sanctions include, the Administrator insists, injunctive relief, imposing a receivership on certain state functions, holding a state official in civil contempt with a substantial daily fine until compliance is secured, and requiring a state to allocate funds from one portion of its budget to another in order to finance the undertakings required by the Agency. The Agency disclaims any authority to seek criminal penalties against state legislators."

Brown v. EPA, 521 F.2d at 831 (footnotes omitted).

the Court in *Brown* rejected along with the prospect of Congress "control[ling] ever increasing portions of the states' budgets," 521 F.2d at 840, are not as serious as those this case presents. For the 1974 Labor Act Amendments contemplate entire State or City Governments as criminal defendants, 29 U.S.C. § 216(a). Unlike the goal of environmental improvement involved in *Brown*, which at least benefited all citizens; these Labor Act Amendments promote more money, almost entirely through overtime payment, for only some of the 11.4% of citizens who are State and local Government employees. Even these employees often prefer compensatory time-off for overtime cash, as the Appellants' briefs point out. In any case, these employees are also taxpayers who will see their taxes increased, their services reduced, or both, under the Labor Act whose administrators they cannot vote down.

A simplistic "rational basis" test, as articulated by the Government, conceives of a Congress limited only by the Bill of Rights, because any possibility of intrinsic limits inside the Commerce Clause itself virtually vanishes with *Katzenbach v. McClung* and *Perez v. United States*. In the Government's perspective, there is room for *State wrongs*, to be corrected congressionally by any means not violative of express guarantees in the Bill of Rights, but no room for *State rights* – or if that is too shopworn a term – for State integrity and autonomy inside State Government itself.

The true question is not whether the national policy is legitimate, or whether its touching the State Government constitutes a small or a large battery, but whether there is any *significant national harm* which can be averted only by the intrusion of these Amendments.

CONCLUSION

This case is not controlled in any way by *Maryland v. Wirtz*. The unprecedented damage to our Federal system of non-interference, one Government with another, cannot stand on the weak nexus to commerce articulated by the Congress in passing Public Law No. 93-259. The Federal interest here is too tenuous, the interest of States and Cities too important and too threatened, for this Court not to reverse the District Court below and to declare these 1974 Amendments unconstitutional.

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Supreme Court of the United States

OCTOBER TERM, 1975

THE NATIONAL LEAGUE OF CITIES, ET AL., *Appellants*

v.

WILLIAM J. USERY, Secretary of Labor

THE STATE OF CALIFORNIA, *Appellant*

v.

WILLIAM J. USERY, Secretary of Labor

On Appeals from the United States District Court for the District of Columbia

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SUPPLEMENTAL BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND FOR THE NATIONAL EDUCATION ASSOCIATION, AS AMICI CURIAE

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ARGUMENT

The lone intervening legal event of significance to the decision of these cases since the elaborate opening briefs were filed is last Term's decision in *Fry* v. *United States*, 421 U.S. 542. In his supplemental brief for the Secretary, the Solicitor General shows that the "basic rationale" of *Fry* (which in turn was controlled by *Maryland* v. *Wirtz*, 392 U.S. 183) "supports the constitutionality of the 1974 Fair Labor Standards Act Amendments" (Gov't. Supp. Br. 12). We shall not elaborate on that argument, except to point out that in *Fry* the petitioner and the *amici curiae*

supporting him (including one of the present appellants, the State of California) made the same apocalyptic pronouncements which form the core of the briefs on appellants' side in the present cases. But we think it will be useful to discuss the dissenting opinion in *Fry* of Mr. Justice Rehnquist, because it is a frontal attack on *Maryland* v. *Wirtz*, and its precursors, most especially *United States* v. *California*, 297 U.S. 175. For, we readily acknowledge that while in our view those cases compel the conclusion that the 1974 FLSA Amendments are constitutional, those Amendments cannot survive if *Maryland* v. *Wirtz* and *California* are overruled.

I.

At the outset, Justice Rehnquist suggests that rejection of the state's claim in *California* was a by-product of the dramatic shift in the Court's interpretation of the Commerce Clause:

> "The case was decided in 1936, at the beginning of what might be called the present era of Commerce Clause law in this Court. The Court was in the process, later completed in cases such as *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and *United States* v. *Darby*, 312 U.S. 100 (1941), of freeing both Congress and the States from the anachronistic and doctrinally unsound constructions of the Commerce Clause which had previously been used to deny both to the States and to Congress authority to regulate economic affairs. It is quite understandable in this context that the Court in *United States* v. *California* should have been inclined to give somewhat short shrift to a claim of 'states' rights,' even when invoked by the State itself against congressional authority under the Commerce Clause. The claim of 'states' rights' had so frequently been invoked in the past as a form of *ius tertii*, not by a State but by a business enterprise seeking to avoid congressional regulation, that the different tenor of the claim made by the State of California may not have impressed the Court." (421 U.S. at 551.)

We submit that *California* cannot be explained away as a manifestation of the *zeitgeist* because: a) when *California* was decided "the process • • • of freeing both Congress and the States from • • • anachronistic and doctrinally unsound constructions of the Commerce Clause" had not yet begun; b) *California* was a unanimous decision, whereas four Justices dissented in *Jones & Laughlin;* and c) *California* was not a case of first impression, it followed other decisions, most notably that of Justice Holmes, also for a unanimous Court, in *Sanitary District* v. *United States*, 266 U.S. 405. We now develop each of these points.

A. *California* was decided on February 3, 1936.[1] *Jones & Laughlin* was not decided until over a year later, on April 12, 1937. Three and a half months after *California*, and ten and a half months before *Jones & Laughlin*, the "anachronistic and doctrinally unsound" interpretation of the Commerce Clause was still in full flower when, on May 18, 1936, the Court decided *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (relied on here by Appellant California (Cal. Br. 30-32)). In short, there is no need to pinpoint the precise moment when the "process" of repudiating prior unsound constructions of the Commerce Clause began, for it is clear that when *California* was under consideration the old dispensation still held sway with the majority of the Court.

[1] Just four weeks before, on January 6, 1936, the Court had decided *United States* v. *Butler*, 297 U.S. 1.

B. The central issue in *Butler*, *Carter* and *Jones & Laughlin* was whether activities which are themselves local —most importantly "production"—are subject to regulation under the Commerce power. The issue in *California* was whether activities which would be subject to regulation under the Commerce power if undertaken by private parties are immune from such regulation because they are undertaken by the State in the exercise of a "power reserved to the states" be it in a "sovereign" or "private" capacity (297 U.S. at 183-184).

We cannot accept the proposition that this difference escaped the powerful minds—Hughes, C. J., Brandeis, Stone, Cardozo and Roberts, J. J.—who adopted the modern view of the Commerce Clause in *Jones & Laughlin*. And, it is utterly inconceivable that the four Justices who dissented vigorously in *Jones & Laughlin* against what they deemed to be an intolerable extension of national power could one year earlier in *California* have been so swept away by the trend of the majority's thinking as to give "short shrift to a claim of 'states' rights" (421 U.S. at 551). Surely, the concurrence in *California* of these four Justices—whose devotion to federalism has rarely been equalled in the history of this Court—is powerful testimony that the reasoning of that decision is in no wise inconsistent with the Constitutional limitations on national power.

In short, the conception that *California* was a *folie a neuf* on the road to *Jones & Laughlin* is as psychologically implausible as it is historically untenable.

C. After all, *California* did not declare new doctrine. Its principal holding was preordained by the unanimous decisions in *Sanitary District*, 266 U.S. 405, and *Board of*

Trustees v. *United States*, 289 U.S. 48. It is these decisions which support the basic holding of *California* that "The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution" (297 U.S. at 184). See also *id.*, citing *Sanitary District* and *Board of Trustees* (together with two other cases in which the issue of constitutional power was not discussed) followed by the statement: "In each case the power of the state is subordinate to the constitutional exercise of the granted federal power."[2]

II.

The *Fry* dissent accepts the doctrine "that Congress may pre-empt state regulatory authority in areas where both bodies are otherwise competent to act" but finds it "difficult to understand how it supports the proposition that the States are without a constitutional counterweight which can limit Congress' exercise *against them* of its commerce power" (421 U.S. at 552, emphasis in original). The Supremacy Clause is surely the answer to this "difficult[y]." That clause extends to all "Laws of the United States which shall be made in Pursuance" of the Constitution, that is, in the exercise by Congress of one of the powers delegated to it. Mr. Justice Holmes therefore correctly disposed of the problem posed in the *Fry* dissent with his characteristically incisive observation in *Sanitary District:*

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[2] The *Shreveport Rate Cases*, 234 U.S. 342, discussed in the *Fry* dissent (421 U.S. at 551-552), dealt with the minor premise necessary to the result in *California* that the "power of a state to fix intrastate railroad rates must yield to the power of the national government when their regulation is appropriate to the regulation of interestate commerce" (297 U.S. at 184).

"This is not a controversy between equals. The United States is asserting its soverign power to regulate commerce • • •" (266 U.S. at 425).

Emotive force is obtained, but at the cost of analytic precision, by characterizing the federal law regulating wages paid by a state as a regulation "*against*" the state, or by describing this case as one in which Congress has regulated a state "as a state" (421 U.S. at 552).

A state acts *as a state* most clearly when it is enacting and enforcing its laws. But the precise office of the Supremacy Clause is to subordinate such state laws to federal laws enacted pursuant to a delegated power. That clause is not directed to enabling "federal regulation of persons and enterprises" (421 U.S. at 221). It establishes a hierarchy between the federal government, when exercising one of its enumerated powers, and the states. Thus, Chief Justice Marshall's seminal opinion in *McCulloch* v. *Maryland*, 4 Wheat. 316, 400, begins:

> "In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government."

It is precisely because the Supremacy Clause establishes that hierarchy that the preemptive effect of federal law can

not be characterized as the use of hostile force by the federal government against the states.

III.

We are therefore down to the point whether there exists "the inherent affirmative constitutional limitation on congressional power" which the *Fry* dissent "believe[s] the States possess" (421 U.S. at 553), and which the Court in *California* denied. We submit that the Court was right in *California*, as it was right in *Sanitary District* and in *Maryland* v. *Wirtz*. We shall not reiterate what was there said but we think it is significant to point out that the dissenting opinion in *Fry* does not identify any particular constitutional provision as the source of a limitation. While the favorable reference to the Tenth Amendment in Justice Douglas' dissent in *Maryland*, and in the majority opinion in *Fry*, are noted with approval (421 U.S. at 550, 552), the dissent says also:

> "As it was not the Eleventh Amendment by its terms which justified the result in *Hans* [v. *Louisiana*, 134 U.S. 1], it is not the Tenth Amendment by its terms that prohibits congressional action which sets a mandatory ceiling on the wages of all state employees."

> "Both Amendments are simply examples of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation" (*Id.* at 557).

The analogy with *Hans* is imperfect for two reasons. First, the Eleventh Amendment, unlike the Tenth, is a specific restriction on the powers of the federal government, rather than a mere reiteration that federal authority is limited by the terms of the grant in the original Articles of the Constitution. Second, the Court in *Hans* did not draw from the Eleventh Amendment any general rule of state sovereignty, but treated the enactment of that Amendment as a repudiation of the construction which the Court had given to Article III in *Chisholm* v. *Georgia*, 2 Dall. 419, and a return to what the *Hans* court deemed to be the original understanding of the scope of federal judicial power. Thus, *Hans* might support a contention that the Tenth Amendment points the way to a particular reading of the Commerce Clause, but the *Fry* dissent does not rely on any interpretation of that Clause to justify its conclusion.

Moreover, we do not see how the *Fry* dissent can be squared with Mr. Justice Douglas' distinction of the rule under the Eleventh Amendment and that under the Tenth in *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279, 284:

> "Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States."

Finally, it is significant that no prior decision is cited for the view that the Tenth Amendment has radiations beyond its own terms. That proposition is quite inconsistent with the repeated holding that the Tenth Amendment "states but a truism that all is retained which has not been surrendered." *United States* v. *Darby*, 312 U.S. 100, 124; *Case* v. *Bowles*, 327 U.S. 92, 102; *Sperry* v. *Florida Bar*, 373 U.S. 379, 403. Under these cases the Tenth Amendment has no independent force, either by virtue of its terms or, *a fortiori*, by implication. The "understanding of those who drafted and ratified the Constitution" which the Tenth Amendment reaffirms, is that the legislative powers of Congress are not all encompassing, but extend only to those delegated in the Constitution. Nothing in that Amendment, or the cases construing it decided to date, suggest a limitation on the preemptive effect of a federal law enacted pursuant to those delegated powers. Indeed, the plain language, and uniform understanding, of the Supremacy Clause belies any such suggestion.

The "significance of the Tenth Amendment" (*Fry*, 421 U.S. at 547, n. 7) is not that it grants this Court a license to "carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because these enterprises happen to be run by the States for the benefit of their citizens" (*Maryland* v. *Wirtz*, 392 U.S. at 198-199), but that "the States' integrity [and] their ability to function effectively in a federal system must be preserved" (*Fry*, 421 U.S. at 547, n. 7). While, here again, the appellants and the *amici curiae* on their side make "extravagant claims on this score," the 1974 Amendments to the FLSA constitute "no such drastic invasion of state sovereignty" (*id.*).

On the contrary, those Amendments merely regulate the cash nexus between states and their employees. That economic relationship is "indistinguishable in [its] effect on commerce from [the employer-employee relationship in]

private businesses'' (*Maryland* v. *Wirtz*, 392 U.S. at 199). It has been understood since *United States* v. *Darby* that Congress has the Constitutional authority to regulate minimum wages and maximum hours in the private sector, and private enterprise's ''ability to function effectively'' has survived the past 30 years without harm. Neither the experience since *Maryland* v. *Wirtz* was decided, nor the facts in the record here, provide a basis for the conclusion that the 1974 FLSA amendments will undermine the states' ''ability to function effectively.'' And, under *Fry*, absent such a showing the states' reliance on the Tenth Amendment is unavailing.[3]

IV

In sum, it is the Supremacy Clause, not the Tenth Amendment or its penumbra, that defines the relationship between the federal government and the states. That relationship is the same whether, as in *McCulloch* v. *Maryland*, an Act of

[3] One of the *amici curiae*, the National Institute of Municipal Law Officers, asserts that there is no nexus between state wage payments and interstate commerce; it purports to apply ''rudimentary economic realism in the style of the University of Chicago 'school' on economic analysis'' (NIMLO Br. 35-36). We suspect that these economists would blush at this economic analysis, and we are confident that they would be outraged at the irresponsible use of cost figures and other statistics by the appellants' side in these cases. We suppose also that while Professors Hayek, Friedman and Director undoubtedly regard the FLSA to be unwise as applied to *any* employer, they would shudder at any constitutional principle which, like the rule espoused by appellants here, would give public employers a competitive advantage over private employers, by relieving the former, but not the latter, from regulation under the federal minimum wage and maximum hour laws.

Congress is said to supersede a state law, or whether as here, and in *Maryland* v. *Wirtz*, it is said to supersede a state wage policy (which is also based ultimately on a state law). To subordinate an Act of Congress to the judgment of the state in either case would reverse the whole course of constitutional decision since *McCulloch*.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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